UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re:	:	Case No. 10-BK-31607
GARLOCK SEALING TECHNOLOGIES, LLC, *et al.*,	:	Chapter 11
Debtors.[1]	:	Jointly Administered

POST-HEARING RESPONSE BRIEF OF THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS

[FILED UNDER SEAL]

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[1] The Debtors are Garlock Sealing Technologies LLC, Garrison Litigation Management Group, Ltd., and The Anchor Packing Company. As used herein, "**Garlock**" refers to Garlock Sealing Technologies LLC and Garrison Litigation Management Group, Ltd.

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The Official Committee of Asbestos Personal Injury Claimants (the "**Committee**") hereby submits this Response Brief to (i) the Debtors' Post-Trial Brief and Summary of Evidence Presented at Trial, dated November 1, 2013 [Dkt. No. 3205-original filed under seal], (ii) the Debtors' Proposed Findings of Fact and Conclusions of Law, dated November 1, 2013 [Dkt. No. 3207-original filed under seal], (iii) and Coltec Industries, Inc.'s Post-Trial Brief, dated November 1, 2013 [Dkt. No. 3193].[2]

ARGUMENT

I. GARLOCK AND COLTEC'S CRITIQUES OF DR. PETERSON FAIL

A. Dr. Peterson's Forecast Is the Product of an Empirical Methodology that Makes Use of Reliable Data and Informed Expert Judgment

Our response to Garlock's *Daubert* motion showed that its attack on Dr. Peterson's methodology as "unscientific" is wrong, and we incorporate that response by reference here.[3] Dr. Peterson's approach is rooted in social science. Of course, hypotheses predicting the future cannot be tested directly in the present, but that is true of any forecast, including Dr. Bates' forecast. Having devoted three decades to the study of the civil justice system, particularly asbestos personal injury litigation, risk management, and claims resolution practices, Dr. Peterson possesses the relevant knowledge to a degree unmatched by the other estimators in this case.[4] Contrary to Garlock and Coltec's supposition, econometrics enjoys no special standing in

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[2] The initial post-hearing briefs of the parties are cited by the name of the relevant party followed by the abbreviation "Br." as in "**Garlock Br**." Similarly, proposed findings are cited by the name of the party who filed them as "Findings," as in "**Garlock Findings**."

[3] *See* Response and Opposition of the Official Committee of Asbestos Personal Injury Claimants to Debtors' Motion to Exclude or Strike Committee and FCR Estimation Witness Opinions, filed Sept. 27, 2013 [Dkt. No. 3153-original filed under seal].

[4] ACC-825 (Peterson CV); Hr'g Tr. 3847:13-3851:5, Aug. 8, 2013 (Peterson). Garlock's argument that Dr. Peterson lacks the expertise to address the relationship between settlement and liability cannot be taken seriously. More than thirty years ago, he published the ground-breaking
(Footnote continued on next page.)

the law. Courts routinely recognize the probative value of expert opinions that rest on experience and specialized knowledge such as Dr. Peterson brings to bear.[5]

Garlock and Coltec fare no better when they descend from high theory to specific criticisms of Dr. Peterson's estimate. They complain of his reliance on Garrison's historical claims database, and insist that he should instead have used questionnaire responses to ascertain the percentage of mesothelioma claims Garlock would pay.[6] They also take exception to the calibration period Dr. Peterson selected for deriving forecasting assumptions. Neither criticism has merit.

(Footnote continued from previous page.)
empirical study on that subject. *See* Mark A. Peterson & George L. Priest, *The Civil Jury: Trends in Trials and Verdicts, Cook County Illinois, 1960-1979* (1982). His co-author in the Cook County study was George Priest, whom Dr. Bates extols as one of the fathers of "Law and Economics." Dr. Peterson and Professor Priest's joint empirical investigation of the tort system points out that the variables affecting verdicts are various and unpredictable. *See id.* at 58-59. Litigation is far too complex for mesothelioma verdict amounts to be predictable from the plaintiffs' age, life status (dead or alive) at the time of filing and state of filing, as Dr. Bates posits for pending claims, much less from the plaintiffs' ages alone, as Dr. Bates supposes for future claims. Hr'g Tr. 2764:1-2765:13, Aug. 2, 2013 (Bates); 3935:12-3938:4, Aug. 8, 2013 (Peterson).

[5] *See, e.g.*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (noting that there are "many different kinds of experts, and many different kinds of expertise"); *Adams v. NVR Homes, Inc.*, 141 F. Supp. 2d 554, 567 (D. Md. 2001) (finding that real estate appraiser offering forecast of how long a home's value would be impaired by environmental contamination, while not strictly scientific in nature, had a "'reliable basis in the knowledge and experience in the discipline'" sufficient to satisfy *Kumho Tire*); *E. Tenn. Natural Gas Co. v. 7.74 Acres*, 228 F. App'x 323, 327-28 (4th Cir. 2007) (holding that trial court did not need to determine which expert offering a real estate appraisal chose the correct comparables in the context of a *Daubert* challenge).

In re Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497 (D. Kan. 1995), cited by Garlock, is inapposite. First, that case was decided several years before the Supreme Court clarified the application of *Daubert* in *Kumho Tire*. Also, the expert in *Aluminum Phosphide* selected a baseline price but "ignored price trends" and failed to address other factors that might "impact price levels during [] normative periods." *Id.* at 1504. Dr. Peterson did both, taking into account Garlock's rising case resolution values and explaining why those values rose. Hr'g Tr. 3868:2-3881:6, 3887:4-12, Aug. 8, 2013 (Peterson).

[6] Garlock Br. at 139-42; Coltec Br. at 24-26 & n.24.

1. Dr. Peterson Properly Calculates the Claims Acceptance Rate on the Basis of Historical Data

Garlock and Coltec insist that Dr. Peterson should have used questionnaire responses rather than information from Garrison's historical claims database to derive his assumptions about the percentage of pending and future claims eligible for payment.[7] Dr. Peterson had sound reasons for preferring the data Garrison gathered and maintained in the normal course of claims management, rather than from responses to the questionnaire designed for Garlock's post-bankruptcy purposes. But Dr. Peterson did not ignore questionnaire responses. Rather, he concluded, based on his own team's examination of responses to the Mesothelioma Claim Questionnaire and the Supplemental Exposure Questionnaire, that the responses were broadly consistent with the historical database and even indicated a modestly higher percentage of compensable claims among the respondents than among the persons whose claims Garlock resolved historically.[8] Nor did his reliance on the historical data distort his estimate in any way.

In his forecast, Dr. Peterson assumed that 42% of the pending and future claims filed will be rejected without payment, which of course translates to a 58% acceptance rate.[9] That assumption was based on Garlock's actual experience in resolving claims during the chosen calibration period; it resulted from Garlock's policy of requiring claimants, as a condition of settlement, to produce evidence that the injured person worked with or around its asbestos

[7] Garlock Br. at 139-40; Coltec Br. at 19-26.

[8] ACC-628 § 6.2, at 11 (Expert Report of Mark A. Peterson (Feb. 2013)). Garlock has put Dr. Peterson's report before the Court as Exh. C to Debtors' Brief in Support of Their Motion to Exclude or Strike Committee and FCR Estimation Witness Opinions, filed July 3, 2013 [Dkt. No. 2990-original filed under seal].

[9] Hr'g Tr. 3883:18-3884:1, Aug. 8, 2013 (Peterson).

products.[10] By examination of questionnaire responses, Dr. Bates arrived at a similar acceptance rate for pending claims (55.4%). For future claims, Dr. Bates estimated different acceptance rates for each occupational category delineated by Mr. Henshaw, Garlock's industrial hygiene expert; the weighted average of those differing rates (59.2%) was marginally higher than the single rate (58%) assumed by Dr. Peterson. Thus, Bates White's work confirms Dr. Peterson's view that the questionnaire responses and the historical data point to acceptance rates in the same range.

No reason exists, then, to suppose that the historically-derived 58% acceptance rate used in Dr. Peterson's forecast has overstated the number of payable claims. On the contrary, if Dr. Bates' reduction of pending mesothelioma claims on the basis of questionnaire data is accompanied, as in fairness it should be, by the addition of mesothelioma claims statistically estimated to have been misrecorded in other disease categories in the Garlock database,[11] the resulting count of compensable claims would line up closely with what Dr. Peterson found by applying his historically-derived acceptance rate assumption. Specifically, the results of that comparison are as follows, where the "Peterson" and "Bates" columns show their respective counts and the "Bates-Adj." column provides the count resulting from Dr. Bates' approach when adjusted to include the estimate of misrecorded mesotheliomas at his assumed acceptance rate for pending claims (55%):

[10] Committee Br. at 12.

[11] The number of mesothelioma claims misrecorded in other disease categories may be estimated by comparing the classification of individual claims in successive versions of the Garrison Database, as Dr. Peterson explained in the Estimation Hearing. Hr'g Tr. 3957:6-3959:21, Aug. 8, 2013 (Peterson). His analysis suggested the version of the Garrison Database employed by the parties in this proceeding contains 859 claims that should have been included in the mesothelioma category but were not.

Compensable Claims Forecasts

Period	Peterson	Bates	Bates-Adj.
Pending	2,757	2,177	2,653
Future	14,972	16,807	16,807
Total	17,729	18,984	19,460

Notwithstanding this rough congruence, Dr. Bates' process was skewed. To begin with, Bates White made no effort to quantify the extent to which Garrison misrecorded mesothelioma claims as ones for lung cancer, nonmalignant conditions, or unknown disease.[12] In valuing claims at zero based on its review of questionnaire responses,[13] furthermore, Bates White committed the fundamental error of equating questionnaire responses with fully developed claims. The testimony of plaintiff attorneys Joe Rice and Michael Shepard explains why questionnaire responses cannot be anything more than a snapshot of a claim taken at an arbitrary time.[14] For example, in Massachusetts, where Mr. Shepard practices, the court responsible for asbestos cases manages its docket in such a way that, to minimize litigation costs, only a small number of claims are ever worked up in discovery.[15] All claimants in Garrison's database brought suit against Garlock; each has at the very least alleged illness caused in part by a Garlock product or one for which Garlock is otherwise legally responsible. For aggregate estimation, the question is how many claimants the forecaster should predict would ultimately

[12] *See* n.11, *supra*; *see also* Committee Br. at 51-52. Contrary to Garlock's suggestion (Garlock Br. at 140-41), the phenomenon of misrecording claimants' disease types is not confined to claims of unknown disease category, but occurs in all disease categories. *See* Hr'g Tr. at 3957:2-3960:15, Aug. 8, 2013 (Peterson).

[13] *See* Garlock Br. at 85 & nn.309-10.

[14] Hr'g Tr. 3594:16-3599:22, Aug. 7, 2013 (Rice); Shepard Dep. 136:8-137:7, 144:8-145:21, 145:23-148:15l, 148:23-149:10, 168:5-173:23, 175:25-176:10, 176:25-177:21, 178:16-182:14, Dec. 4, 2012.

[15] Shepard Dep. 34:24-37:16, Dec. 4, 2012.

provide sufficient evidence to extract a payment from Garlock if the claims were processed and resolved in the tort system. But few of the pending claims targeted by Garlock's questionnaires will have achieved trial readiness by the time responses were due, given docket management rules, case preparation practices, Garlock's preference for settling most claims in groups as early as possible, and the automatic stay.[16] Viewed objectively, the questionnaire process has not produced information superior to the data Garrison captured in the ordinary course of claims management.

2. Dr. Peterson's Selection of the Most Recent Years For a Calibration Period Is Mandated By the Facts

Garlock and Coltec focus their attacks on Dr. Peterson's choice of "calibration period," the span of Garlock's claims history that he considers most relevant for developing assumptions about what percentage of future mesothelioma victims would assert claims against Garlock if it were not bankrupt (the propensity to sue), what percentage of those claims would be paid (the acceptance rate), and what amount Garlock would pay on average when compensating claimants (the payment amount). Dr. Peterson chose for calibration the period 2006 until June 2010, when Garlock filed bankruptcy. Garlock and Coltec would prefer to look back to the 1990s, when the litigation focused on the manufacturers of products other than gaskets, especially asbestos-containing insulation. But no one has argued that asbestos litigation against solvent defendants

[16] This Court specifically ruled that questionnaire respondents were not required to engage in trial preparation or investigate their claims further for questionnaire responses. All they had to do was provide information already obtained. *See* Order Granting in Part and Denying in Part the Debtors' Motion for an Order Compelling Mesothelioma Claimants to Comply with This Court's Questionnaire Order and Overruling Objections to the Questionnaire at 4, ¶ 5, dated Mar. 16, 2012 [Dkt. No. 2036].

in the tort system today comes close to replicating the conditions of the 1990s.[17] Garlock itself recognizes the drop-off of annual filings for nonmalignant claims that characterized its own experience and that of asbestos defendants generally in the 1990s and early 2000s.[18] The predominance of nonmalignant claims affected the tort system profoundly in the 1990s. Among other things, it (i) made for clogged asbestos dockets; (ii) stimulated judicial experimentation with mass consolidations and other departures from traditional procedures; (iii) prompted many defendants to band together in joint-defense consortia and engage in "inventory settlements" as a way of disposing of large numbers of claims with very small average payments; and (iv) led to "settlement class actions" aimed at imposing uniform medical criteria and alternative dispute resolution procedures and involving vast notice programs that called forth even larger numbers of claims.[19] None of these phenomena characterize the period 2006-2010. Nor has Garlock suggested (much less proven) any likelihood that the characteristics defining asbestos litigation in the 1990s will recur in the future.

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[17] *See generally* ACC-824a at 2-10 (Peterson demonstrative exhibits summarizing history of asbestos litigation).

[18] Magee Dep. 69:5-71:2, Jan. 23, 2013. Dr. Peterson's failure to predict the decline in nonmalignant claims does not undermine the reliability of his methodology, but simply points out an inherent limitation of any approach based principally on data. *See* Response and Opposition of the Official Committee of Asbestos Personal Injury Claimants to Debtors' Motion to Exclude or Strike Committee and FCR Estimation Witness Opinions at 20-22, filed Sept. 27, 2013 [Dkt. No. 3153-original filed under seal]. Sudden changes in the tort system will not be captured in a debtor's claims data as of the petition date. Economic models suffer from the same limitation, as Robert Shiller, one of this year's Nobel laureates in economics, pointed out just days ago. Asked about the recent economic crisis, he lamented that it was "hardly predicted" among economists, and added that his own study of economic forecasting models indicates that "the models aren't very good at seeing major turning points." B. Cronin, *Shiller Weighs in on Key Economic Issues, While Preparing Nobel Lecture,* Wall St. J., Nov. 15, 2013 (reproduced as Ex. A to this brief).

[19] Hr'g Tr. 3542:18-3549:19, 3550:25-3551:8, Aug. 7, 2013 (Rice).

In one respect, the 1990s and the 2000s were similar, but in a way Garlock would rather ignore: Both decades saw significant numbers of asbestos bankruptcies, as asbestos liabilities exhausted the resources of some defendants and brought formerly "peripheral" ones to center stage. This was not a new pattern. In each phase, the defendants declaring bankruptcy had been "peripheral" until prominence was thrust upon them by the exit through bankruptcy of other defendants whose notoriety came earlier. This dynamic has operated ever since the bankruptcy of Johns-Manville in 1982,[20] and Garlock's complaint that it was uniquely disadvantaged by any "Bankruptcy Wave" does not stand up. Furthermore, few significant bankruptcies occurred during Dr. Peterson's calibration period, 2006-2010, compared to the earlier years of the same decade or to the 1990s.[21]

Throughout the calibration period, the litigation centered on mesothelioma claims. The relative stability of Garlock's claims experience in the latter half of the 2000s allows for the patterns of claims and resolutions to emerge more clearly from the data in comparison to the turbulent 1990s and early 2000s. As Garlock's own brief shows, moreover, many of the changes it argues tilt the tort system in defendants' favor were already well under way during the calibration period selected by Dr. Peterson.[22] Because Garlock followed developments in the tort system closely and negotiated settlements against that backdrop, the impact of those changes is embedded in the settlement values it achieved in that period. Garlock has shown no trend that would justify reducing the estimate of mesothelioma claims to a level below that indicated by the

[20] Hr'g Tr. 3540:5-8, 3540:25-3451:15, 3546:3-8, Aug. 7, 2013 (Rice); Hr'g Tr. 3420:4-19, 3431:25-3435:9, Aug. 6, 2013 (Hanly); Hr'g Tr. 3476:9-3477:8, Aug. 7, 2013 (McClain); *see also* ACC-824a at 1-17.

[21] GST-8017 at 56 ("The Bankruptcy Wave" demonstrative).

[22] Garlock Br. at 51 (chart).

data from the calibration period. *See In re Federal-Mogul Global, Inc*, 330 B.R. 133, 157-58 (D. Del. 2005) (finding Dr. Peterson's estimate more reliable because it was based on a calibration period reflecting the most recent developments).

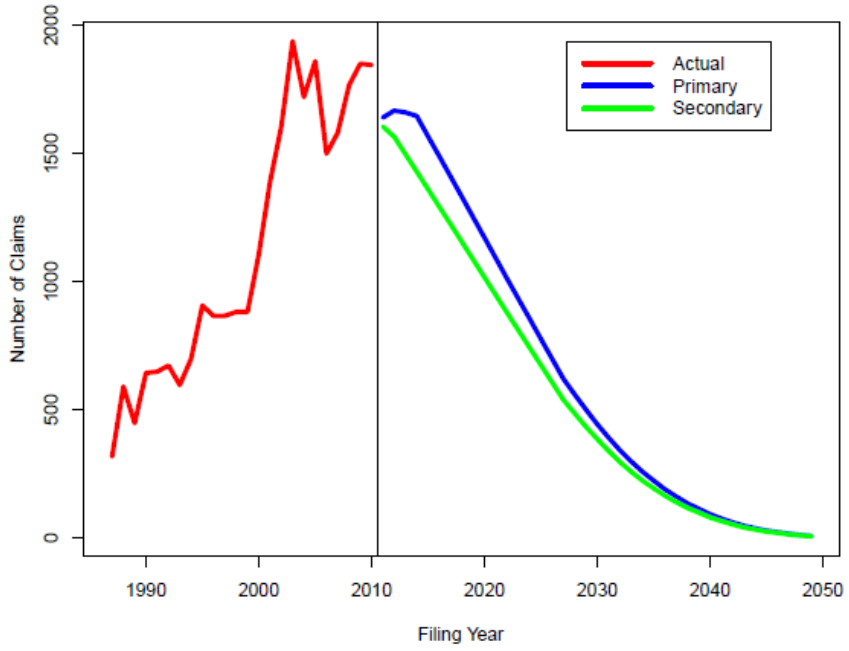
In contrast to Garlock's wishful thinking, Dr. Peterson's observation that mesothelioma victims' propensity to sue Garlock rose steadily during the calibration period is founded on data. He builds into his forecast the assumption that the propensity to sue Garlock, were it still in the tort system, would increase for several years at a rate derived from that data. That derivation is conservative: it gives effect to the trend at a rate that is in the middle of the range indicated by reasonable alternative ways of calculating it.[23] Furthermore, the forecast assumes fewer annual claim filings in *every* year of the forecast than Garlock actually received in *any* year from 2008 to 2010, as illustrated by the following chart presented at the Estimation Hearing:[24]

[23] Hr'g Tr. 3961:7-3962:24, Aug. 8, 2013 (Peterson). *See also* Committee Br. at 47.

[24] *See* ACC-824a at 36. *See* Section IV, *infra*, and accompanying text. The incidence of mesothelioma is assumed to decrease over the entire the period of the forecast. In Dr. Peterson's forecast, a near-term increase in the propensity to sue is mostly offset by the declining incidence, but the pace of that decline soon overrides all other factors as the "incidence curve" erodes.

Forecast — Future Claims Estimation

Our Forecast Number of Claims Is Well Below Garlock's Pre-Petition Claim Levels



Dr. Peterson's "increasing propensity" assumption is data-driven, logical, and implemented conservatively in his forecast. The opposing parties dislike the assumption because it points to a higher aggregate estimate than would a static propensity to sue. But the data show the propensity was in fact increasing, which is hardly surprising given the publicity surrounding mesothelioma as a result of large verdicts and the growth of lawyer advertising through television and the internet. To ignore the trend would reduce the estimate for no valid reason. That is what Dr. Peterson meant when he said an estimate based on a "no increase" scenario would be "implausibly low."

B. Coltec's Assertion that Dr. Peterson's Methodology Coupled with Tort System History Somehow Distorts Garlock's Responsibility Is Patently False

Coltec spends much of its brief asserting that the plaintiffs' bar and Dr. Peterson have, over several decades, devised a way to collect more from Garlock than plaintiffs deserve. The gist of Coltec's tale is that "liability" was shifted from the "most culpable" defendants, who Coltec says filed for bankruptcy first, to "less culpable" ones who remained in the tort system until later.[25] These remaining defendants, goes the story, are unfairly saddled with the liability attributable to the bankrupt entities. Then, when those defendants in turn file for bankruptcy, they are compelled to "overfund" their trusts because their liabilities are estimated to include shares attributable to earlier bankrupts and thereby "inflated."[26]

Coltec begins with a false premise. The notion that the "most culpable defendants were the earliest to file for bankruptcy protection"[27] has no record support or justification.[28] In reality, asbestos defendants do not file for bankruptcy in order of their relative "culpability." They file at various times for various reasons: the status of their financial resources, the amount of their available insurance, their management's and shareholders' objectives, their position in litigation and the availability of proof against them, the cost-effectiveness of their defense strategies, and so on. When they enter bankruptcy is not, therefore, a reflection of comparative fault, but happenstance. If, as it once contemplated, Garlock had declared bankruptcy earlier in the 2000s,

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[25] Coltec Br. at 6-12.

[26] Coltec Br. at 12-14.

[27] Coltec Br. at 6.

[28] The best Coltec offers is a footnote reinterpreting the words "peripheral" and "major" used by Dr. Peterson in testimony. Coltec Br. at 7 n.5. These words describe the degree to which a defendant is the focus of litigation, not its culpability. Indeed, Coltec would likely agree that being sued is not the same as being "culpable."

or even in the 1990s,[29] it would be nonsense to say it was therefore more "culpable." Nor, presumably, would Garlock concede that it is bears greater responsibility than asbestos defendants that remain in the tort system today.[30]

Coltec next hypothesizes that system-wide "liability shares" apply to each asbestos defendant.[31] But no court has ever made such a system-wide determination. No court ever decides that Pittsburgh Corning is "13%" liable for mesothelioma nationwide, or Owens Corning "20%." Liability shares are only adjudicated in the context of an individual case on individual facts leading to an individual verdict.[32] The cast of defendants and the percentages of fault found in any one case are different in the next. Indeed, the entire concept of relative "culpability"

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[29] *See Coltec Indus., Inc. v. United States*, 62 Fed. Cl. 716, 739 (Fed. Cl. 2004) ("On December 4, 1995, Coltec met with Kaye Scholer, the law firm that represented Johns-Manville, to discuss the option of placing Anchor, and perhaps Garlock, into bankruptcy . . . ."), *vacated*, 454 F.3d 1340 (Fed. Cir. 2006) (ACC-174).

[30] Exhibit A to Coltec's Brief discussed further below, contains a list of asbestos bankruptcies that undermine its assertion about timing and relative culpability. Specifically, many of the listed entities that filed for bankruptcy years before Garlock are not the insulation manufacturers whom Garlock has depicted as most blameworthy, but manufacturers of other types of products or providers of services. For example, United States Gypsum ("**USG**") is listed on Coltec's Exhibit A as having provided the second-greatest amount in trust funding ($3,363,195,000.00). The principal source of USG's asbestos personal injury liability was asbestos-containing joint compounds, which were used in the construction industry and applied over the seams in wallboard to create a smooth appearance. Debtors' Informational Brief at 3, *In re USG Corp.*, No. 01-2094 (Bankr. D. Del. June 27, 2001) (ACC-903).

[31] Coltec Br. at 7-9.

[32] "Market share" liability has been uniformly rejected by the courts in asbestos litigation. *See, e.g.*, *Marshall v. Celotex Corp.*, 651 F. Supp. 389, 393 (E.D. Mich. 1987) ("I find that asbestosis litigation is an inappropriate area in which to extend market share liability."); *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982) ("[T]he market share liability theory was not intended to be applied in a context such as the one which is before the court. Where asbestos is the product in question, numerous factors would make it exceedingly difficult to ascertain an accurate division of liability along market share lines."); W. Page Keeton et al., *Prosser and Keeton on Torts* § 103, at 714 (5th ed. 1984) ("[i]t would not be appropriate to apply [the fungible product concept of market share liability] to asbestos-containing products").

makes no sense at the aggregate level. Simply because W.R. Grace filed for bankruptcy nine years before Garlock did does not mean that in every case in which Garlock is found liable, W.R. Grace must be adjudged *more* liable.

Coltec then asserts that tort system defendants like Garlock did not receive adequate "credit" for trust payments against their liabilities.[33] But Garlock has received the credit to which it is entitled under law. Coltec's entire argument ignores a fundamental point: settling defendants are not entitled to credit of any kind for payments made by others[34]—and Garlock settled more than 99% of the claims that it paid. Furthermore, in the rare event of a verdict, credit for trust payments, like any settlement payment, is determined by operation of state law. In states that have adopted joint and several liability, the successful plaintiff may collect the entire verdict from any defendant adjudged liable, subject to set-offs for settlement moneys the plaintiff has already received when the verdict is molded into a judgment.[35] Set-offs against the verdict for amounts paid by trusts or settling defendants may be calculated in various ways, *pro-rata* or *pro-tanto*, but this too is determined by state law. In states with several liability, by contrast, each defendant is liable only for that portion of a verdict for which it is adjudged responsible. In such a state, if Garlock were found 30% responsible for a $1,000,000 verdict, it would have to pay $300,000 but no more. Under a rule of several liability, settlement "credits" do not exist and there can be no "transfer" of liability between defendants, as each defendant's

[33] Coltec Br. at 10.

[34] *See, e.g.*, Uniform Contribution Among Tortfeasors Act § 1(d) (1955) ("A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.").

[35] Committee Br. at 62-63; Committee Findings at 79-80, ¶ 141.

liability is individually determined. State law also determines whether or how a bankrupt entity or trust may appear on a verdict form.[36]

When Garlock settled, of course, it paid only its several share.[37] As a settling defendant, Garlock was not entitled to any "credit," whatsoever, whether by set-off or contribution. On those occasions when it paid a verdict, Garlock's defense counsel took whatever steps they could, consistent with the law of the relevant jurisdiction, to maximize the credit from trust payments and minimize Garlock's share. Garlock and its counsel closely monitored asbestos bankruptcies, and participated actively in some.[38] After satisfying a verdict, Garlock sometimes filed its own asbestos trust claims and recovered significant contributions from those trusts.[39] Thus, Garlock received as much benefit as it was entitled to under various state laws allocating liability and determining set-offs. The Court can be confident Garlock left nothing on the table worth its while to pursue, and that its settlement calculus reflected this.

Of course, Garlock was free to, and did, work to change the laws in state legislatures to relieve Garlock of even more liability.[40] In some states, such as Ohio, Garlock and similarly-minded corporations found success convincing state legislatures to change the rules. In other states, they did not. Garlock and other companies also supported national legislation to remove

[36] Hr'g Tr. 2378:6-2379:20, Aug. 1, 2013 (Turlik).

[37] Committee Br. at 12-13 & n.62 (citing Grant Dep. 38:22-39:23, Nov. 1, 2011; Ferrell Dep. 145:22-146:17, Jan. 11, 2013).

[38] Hr'g Tr. 3245:7-3246:7, 3287:13-3290:2, 3365:11-14, Aug. 6, 2013 (Magee).

[39] ACC-29; Hr'g Tr. 3220:8-14, Aug. 6, 2013 (Magee).

[40] Hr'g Tr. 1401:23-1402:4, July 26, 2013 (Magee); Hr'g Tr. 2578:7-2580:1, Aug. 1, 2013 (Magee).

or reduce the asbestos liability Garlock faced.[41] For example, in 2005, the FAIR Act was put up for vote in Congress. As Mr. Magee explained, the FAIR Act would have provided what some called a national solution.[42] However, that legislation failed to pass. Now Coltec would like this Court to do what Congress and state legislatures declined to do: reform the tort system so as to relieve Garlock and save Coltec's equity in Garlock.[43] Such a legislative program is not one this Court may properly entertain.

Coltec's "Exhibit A," the finale of its syllogism, purports to show how, under accepted estimation techniques, Garlock would be contributing more than others by comparison to historical asbestos bankruptcies. The chart is flawed both in principle and in fact.

The chart compares two very different things: the *funding* that happened to be contributed to certain asbestos trusts,[44] with an estimate of Garlock's mesothelioma *liability*, at least as the FCR's expert calculates it.[45] Comparing these numbers is meaningless. The amount that happens to have been contributed to an asbestos trust is not equivalent to the bankrupt's liability. Instead, it is a function of what assets the bankrupt had available for all its creditors (not just asbestos claimants) and the resultant amount contributed to the trust at the time of the bankruptcy. While creditors often receive less than 100% of what they are owed because debtors lack the resources to pay in full, this does not reduce the allowable amount of the claim but only

[41] For a different perspective on recent legislative efforts, *see* E. Inselbuch et al., *Commentary: The Effrontery of the Asbestos Trust Transparency Legislation Efforts*, Mealey's Litigation Report: Asbestos vol. 28, no. 7 (Feb. 2013).

[42] Hr'g Tr. 1414:20-24, July 26, 2013 (Magee).

[43] Coltec Br. at 18-19.

[44] Coltec Br. Ex. A, col. 3, labeled "Debtor Meso Trust Funding."

[45] Coltec Br. Ex. A, col. 6. This column is the combined value of certain historical mesothelioma settlement payments plus the FCR's expert's estimate.

the payment amount. For present purposes, what should be compared against Garlock's estimated mesothelioma claims is not the funding of other debtors' trusts but the estimate of the mesothelioma claims against them. Set out below is a selection of such estimates made by Dr. Peterson in several cases. What this apples-to-apples comparison reveals is that Dr. Peterson's estimate for Garlock is comparatively modest.

	Peterson mesothelioma estimate (as reported)	Peterson mesothelioma estimate (adjusted to 2010)
Owens Corning	$4.6 billion[46]	$5.8 billion
Fibreboard	$3.4 billion[47]	$4.3 billion
Armstrong	$2.6 billion[48]	$3.3 billion
W.R. Grace	$3.1 billion[49]	$3.8 billion
USG	$5.0 billion[50]	$6.2 billion
Garlock	**$1.265 billion**	**$1.265 billion**
TOTAL	**$20.0 billion**	**$24.7 billion**
Garlock as % of total	**6.3%**	**5.1%**

As shown above, the estimate of present and future mesothelioma claims against Garlock is less than half of the corresponding estimates for any of the other companies listed. Taking just five of those companies,[51] and inflation-adjusting the estimates to 2010, the Garlock estimate is a little over 5% of the total. That percentage would of course be much smaller if all other debtors shown on Coltec's chart were included. These facts simply do not fit Coltec's idea that Dr.

[46] GST-6579 (Peterson OC/FB Report) at 12, 28.

[47] *Id.* at 34, 45.

[48] GST-6581 (Peterson AWI Report) at 7, 23.

[49] GST-6574 (Peterson Grace Report) at 89.

[50] GST-6575 (Peterson USG Report) at 20, 44.

[51] We selected these debtors because Garlock put Dr. Peterson's mesothelioma estimates for them into the record at the Estimation Hearing.

Peterson's estimation methodology and the interplay of bankruptcy and the tort system are somehow compounding Garlock's liability.

Even assuming one could compare the figures presented in Coltec's "Exhibit A," the chart contains other serious errors. For example, the dollar figures come from various years with no corresponding correction for inflation. Accounting for inflation would lead to different results. For example, the Western Asbestos Trust was formed in 2004 with what Coltec says was $1.68 billion for mesothelioma claims. In 2010, that would have been worth about $1.94 billion, more than Coltec says Garlock would contribute for mesothelioma liability. In addition to the inflation adjustment error, the actual figures used in the chart are wrong.[52]

In short, Coltec's "Exhibit A" offers no foundation for Coltec's argument. It is crude obfuscation based on comparing apples to watermelons.

[52] Coltec took the data in the third column, labeled "Debtor Meso Trust Funding," from a 2010 report produced by the Rand Institute for Civil Justice. L. Dixon et al., Rand Institute for Civil Justice, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity, with Detailed Reports on the Largest Trusts*, (2010). That report understates trust funding because it does not include certain funds realized post-formation, such as recoveries from insurance belonging to the trust, appreciation of debtor stock, and dividends. *See, e.g., id.* at Table B.1, ("Notes on Individual Trust Reports"). For example, Coltec asserts the Armstrong World Industries Asbestos Personal Injury Settlement Trust ("**AWI Trust**") had $1.33 billion in "Debtor Meso Trust Funding" and complains that Garlock would, over the same period, have contributed more. In fact, the AWI Trust recovered hundreds of millions from its insurance, and also received dividends from the reorganized debtors' stock, so that at the end of 2012, even after paying almost $900 million in claims since its inception, the trust had $2.65 billion on hand. Armstrong World Industries, Inc. Asbestos Personal Injury Settlement Trust's Notice of Filing of AWI Trust Annual Report for the Year Ended December 31, 2012, Ex. 1.A at 3 & Ex. 1.B, *In re Armstrong World Indus., Inc.*, No. 00-4471 (Bankr. D. Del. Apr. 25, 2013) [Dkt. No. 10799]. As a result Coltec underestimates the "meso trust funding." Using Coltec's method of calculating how much of the funding would be available for mesothelioma claims, the AWI Trust had available almost $500 million *more* for mesothelioma claims than Garlock would have in the same period, not $400 million less.

II. DR. BATES' ALCHEMY IS NOT SCIENCE

More than a little pretense marks the effort to paint Dr. Bates' approach as "science." For instance, Garlock says Dr. Bates used "confidence intervals" to "test" various steps in his analysis, and that this aligns his methodology with the theoretical dictates of Dr. Heckman.[53] *Any* regression software, such as the program used by Bates White, provides confidence intervals as standard outputs. It required no effort on Dr. Bates' part to calculate them, and no one, including Dr. Heckman, has shown why they are at all meaningful for purposes of evaluating Dr. Bates' forecast. Indeed, the most telling point about his confidence intervals is that Dr. Bates made no adjustments to account for them. At every step, he assumed away uncertainty and presented his calculations as though they were objective truths.

What Dr. Heckman advocated was the calculation of confidence intervals for the final estimates, not just for interim steps like the computer output of the verdict/age regression.[54] Dr. Heckman leveled that criticism at the estimates presented by the Committee and the FCR, but Dr. Bates offered no confidence intervals for his final estimate, so Garlock, too, would be tarred with Dr. Heckman's brush if he had addressed the Bates' estimate. Little wonder Coltec carefully avoided asking Dr. Heckman to opine on Dr. Bates' method.

The misleading nature of Dr. Bates' approach goes far beyond statistical window-dressing; its very foundation is at odds with the "Law and Economics" ancestry it claims. Dr. Bates decreed that mesothelioma claims against Garlock can only be fairly estimated by supposing, theoretically, that all such claims were to be tried, and he then extrapolated the value of imaginary trial results in favor of mesothelioma claimants by reference to a collection of

[53] Garlock Br. at 72, 102.

[54] Hr'g Tr. 4249:2-10, Aug. 9, 2013 (Heckman).

verdicts (most not involving Garlock) gleaned from news stories. His novel construct violated some of the most fundamental insights of Professor George Priest, a law professor Garlock extols as a father of "Law and Economics,"[55] not to mention Dr. Heckman. The seminal insight of Professor Priest's career is that cases litigated to conclusion are not a random, representative sample of the population of cases from which they are drawn. He has quoted as only mildly hyperbolic the dictum of Karl Llewellyn, the famous "Legal Realist," that "litigated cases [are to be regarded] as 'pathological': bearing the same relationship to the broader set of disputes 'as does homicidal mania or sleeping sickness, to our normal life.'"[56] In a series of articles published over the course of two decades, Professor Priest has developed the concept that litigated cases are "selected" by the parties precisely because they differ from other cases in ways that make the results of trials highly unrepresentative.[57] And he has applied to legal scholarship the insight that because data selected not at random are subject to "selection bias," they cannot serve as the basis for inferring statistically the characteristics or inter-relationships of

[55] Although designated an expert for Garlock, Professor Priest did not testify at the Estimation Hearing, and his deposition is inadmissible for reasons stated in the Objection the Committee filed simultaneously with its initial post-hearing brief. *See* Committee Br., Appendix I at 11. Dr. Bates, however, purportedly relies on Professor Priest's writings, so it is fair for the Committee to show that those writings in fact undermine the estimation approach Dr. Bates espoused in this proceeding.

[56] G. Priest & B. Klein, *The Selection of Disputes for Litigation*, 13-1 J. Legal. Stud. 1, 2 (1984) (hereinafter "**Priest & Klein, *Selection of Disputes***") (reproduced as GST-0993) (quoting Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 58 (1960)).

[57] *See id.* at 4 (GST-0993); *see* G. Priest, *Selective Characteristics of Litigation*, 9 J. Leg. Stud. 399, 416 (1980) (If parties' expectations are rational, "[d]isputes litigated to judgment will be those selected by the parties because of the high level of uncertainty that attends their resolution. . . . It will be difficult to infer stable and coherent aspects of the legal system from cases whose consistent feature is indeterminacy."); *see also id.* at 416 & n.79 (noting that "[t]he bias resembles methodological problems in various social and natural sciences: . . . in economics, of inferring nonmarket values from observations of market behavior," and citing for this J. Heckman, *Sample Selectivity Bias as a Specification Error*, 47 Econometrica 153 (1979)).

a broader population.[58] For his part, Dr. Heckman received the Nobel Prize for his work in grappling with this very issue and with the complex adjustments needed to make unrepresentative information useful for statistical analysis.[59]

Dr. Bates played fast and loose with these premises of "Law and Economics." He would have it that mesothelioma claims must be estimated by notional trials, even though in real life less than half of one percent have ever or would ever be tried. Thus, he set out to value the universe of such claims against Garlock on the basis of a small number of cases that, because they were tried, are inherently *un*representative. Dr. Bates purported to adjust for "selection bias;" but in fact, all he did was opportunistically "adjust" the verdicts *downward* on the unsubstantiated premises that verdict amounts are predictable by the ages of prevailing plaintiffs, that plaintiffs who go to trial generally are younger than other mesothelioma claimants, and therefore that lower verdicts should be attributed to claimants who prevail in Dr. Bates' notional trials.[60] In the absence of rigorous testing and demonstrated reliability,[61] that exercise is best seen as the deliberate introduction of bias, an excuse seized upon by Dr. Bates to tamp down the values. A more realistic view is that countless variables (many of which may never be detected) figure in the deliberations of juries and shape the verdicts they hand down. Dr. Bates closed his eyes to that complexity in favor of his distorting age assumption, piling bias upon uncertainty to manufacture an unreliable estimate.

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[58] *See generally* Priest & Klein, *Selection of Disputes*, *supra*, at 4, 6-30.

[59] Hr'g Tr. 4229:2-4231:10, Aug. 9, 2013 (Heckman).

[60] Hr'g Tr. 2767:2-6, 2786:18-2788:19, Aug. 2, 2013 (Bates).

[61] Dr. Peterson controverted Dr. Bates' assumption by showing that age is a poor predictor of damage awards. Hr'g Tr. 3934:15-3938:4, 3944:2-3948:23, Aug. 8, 2013 (Peterson).

Similar manipulations taint the "economic model" by which Dr. Bates attributed the vast bulk of Garlock's historical settlements to the avoidance of defense costs, as distinct from the hedging of trial risk. He pulled out of context the settlement model posited by Richard Posner, which Garlock repeated so often at the Estimation Hearing and featured again in its brief.[62] That model describes in a highly abstracted fashion the considerations at play in the settlement of an *individual* case, but the evidence leaves no doubt that Garlock settled most of the claims against it *in groups*. In group settlements, cost savings and risk usually were not priced on the basis of close analysis of individual claims, but rather were negotiated in the aggregate across multiple cases, few of which were worked up in detail. Yet Dr. Bates did nothing to establish the relevance of the Posner model to mass tort litigation or group settlements or adjust it to take account of those realities.

Furthermore, in operating his version of the model for the stated purpose of subdividing unitary settlement payments into separate components of cost avoidance and "liability" avoidance, Dr. Bates engaged in a circular analysis whereby false assumptions predetermine false results. The model was built on the premise that settling parties negotiate the sharing of a fund made up of (i) the estimated damages discounted by the percentage chance that the plaintiff will win a verdict, and (ii) the difference between the defendant's avoidable litigation costs of defense and the plaintiff's avoidable litigation costs. Dr. Bates posited that Garlock bears high defense costs but that plaintiffs' costs of prosecution are negligible. In assuming away plaintiffs' costs, he ignored both the costs incurred by plaintiffs' counsel (including the opportunity cost of

[62] *E.g.*, Garlock Post Tr. Br. at 52; Hr'g Tr. 3088:14, Aug. 5, 2013 (Magee) ("Well I put here Judge Posner's model once again . . . .").

devoting time and effort to one case in preference to another)[63] and the high premium that dying plaintiffs and surviving family members commonly place on avoiding delays and uncertainties of payment.[64] Based on Garlock's trial record in the 1990s, Dr. Bates assumed anachronistically that claimants have just a 5% chance or less of winning a verdict against Garlock.[65]

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[63] In treating the costs incurred by plaintiffs' counsel as irrelevant, Dr. Bates flouted the economic literature in which he claimed to be steeped. The literature certainly recognizes the relevance of plaintiff counsel's costs to the settlement calculus. *See, e.g.*, Priest & Klein, *Selection of Disputes*, *supra*, at 22 & n.49 (GST-0993) (assuming that the cost of litigating divided by the jury award is 33% because this corresponds to "the amount of the most common contingency fee in personal injury litigation"); M. Schwartz & D. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 Stan. L. Rev. 1125, 1134-35 (1970), *available at* http://www.jstor.org/discover/10.2307/1227958 (propounding a model that assumes the contingent-fee lawyer allocates his time with a view to the "opportunity cost" of the case, which consists of foregoing income from work on other cases); S. Leshem, *Contingent Fees, Signaling and Settlement Authority*, 5 Rev. L. & Econ. 1, 19 (2009) ("The probability of settlement depends on the proposer's (i.e., the plaintiff or plaintiff's attorney) benefit from settlement . . . and the opportunity cost of trial."); G. Miller, *Some Agency Problems in Settlement*, 16 J. Legal Stud. 189, 198 (1987) ("These costs will include out-of-pocket expenses and also the opportunity costs to the attorney of the alternative uses the attorney could have made of his or her time had he or she not been working on the case." (footnote omitted)).

From the general principle that the attorney's interest is subordinate to the client's interest, Garlock leaps to the conclusion that the contingent-fee lawyer must persevere in a case even if the client's expectations are unreasonable. *See* Garlock Br. at 33-35. Garlock not only fails to support this ethics argument with case law, but also overlooks the countervailing ethical principle that an attorney has a qualified right to withdraw from a representation when "the representation will result in an unreasonable financial burden on the lawyer." Model Rules of Prof'l Conduct, R. 1.16(b)(6) (2013).

[64] That plaintiffs discount their claims substantially to avoid delay and uncertainty of collection is borne out by recent studies of "structured settlements." Real plaintiffs sometimes settle in exchange for deferred payout rights and then sell those rights for a discounted lump sum. The discounts are equivalent to interest charged on a loan. *See* D. Hindert & C. Ulman, *Transfers of Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Protection Acts*, 44-2 Judge's Journal 19, 19 (Spring 2005) (reproduced as Ex. B). Dr. Bates takes no account of this cost.

[65] Garlock's summary of its trial record (ACC-519) is misleading. Among other things, it does not include cases in which Garlock settled after opening to the jury but before verdict, which was not uncommon. *See, e.g.*, Hr'g Tr. 3508:2-12, Aug. 7, 2013 (McClain). In the 1990s, moreover, Garlock by its own admission was rarely the lead defendant in the courtroom, but the same cannot be said of trials in the 2000s. *Id.* at 3476:9-3478:23.

One can substitute a more realistic set of assumptions for Dr. Bates' skewed ones. Say, for example, that avoidable legal costs on the plaintiffs' side are at least equal to Garlock's, plaintiffs discount their claims by 20% per year to avoid delay and risk,[66] and they have a 36.2% chance of winning at trial in line with actual experience between 2001 and 2010. Then run the adjusted numbers in Dr. Bates' mechanical way to predict the settlement amount and show what relation the total settlement bears to the "Expected defendant liability" (the verdict award multiplied by the probability of the plaintiff's success). The result is the very opposite of what Dr. Bates purports to show. He claims that the settlement amount is usually a multiple of "liability." This runs counter to common sense, so it should come as no surprise that, when more realistic assumptions are fed into the model, it spits out a "Settlement" that is substantially less than the anticipated "Expected defendant liability." The following chart compares the workings of the model when run on (i) the basis of Dr. Bates' assumptions and (ii) on the assumptions we have substituted:

[66] In established markets for cashing out deferred settlement payments, the prevailing discount, expressed as an effective interest rate, reportedly hovered around 20% *per annum* in years for which the information was available (2000 through 2003). Hindert & Ulman, *Transfers of Structured Settlement Payment Rights*, *supra*, at 25 (Ex. B).

IN THE BATES MODEL, ASSUMPTIONS MECHANICALLY DETERMINE RESULTS

	Bates' Assumptions[a]	Adjust for Plaintiff time value, cost symmetry, higher plaintiff success
1. Award if plaintiff wins (1000s)	2,245	2,245
2. Probability of plaintiff award	5%	36%
3. Expected defendant liability (probability x award)	112	808
4. Expected plaintiff recovery (probability x award) minus 30% contingency	79	566
5. Plaintiff costs of delay (20% per annum for 5 years)	0	338
6. Plaintiff recovery net of delay costs	79	227
7. Defense avoidable trial costs	200	200
8. Plaintiff avoidable trial costs	50	200
9. Defendant total cost of trial (3 + 7)	312	1,008
10. Plaintiff total benefit of trial (6 - 8)	29	27
11. Settlement[b]	200	609
12. Plaintiff gain from settlement = .7*Settlement (line11) - benefit of trial (line 10)	112	399
13. Defendant gain from settlement = Settlement(line 11) - total cost(line 9)	112	399
14. Settlement/liability Ratio	179%	75%
[a]Model assumptions and simulation taken from Table 10, Charles Bates Rebuttal Report		
[b]Economic model assumes plaintiff and defendant equally split the gain from avoiding trial		
Gain to plaintiff = (1 - .30)Settlement - Plaintiff total benefit of trial (line 12)		
Gain to defendant = Defendant total cost of trial - Settlement		
Equalization of gains implies that the settlement will be:		
Settlement = (Defendant total trial cost + Plaintiff total benefit)/1.7		

It is not necessary to embrace either set of assumptions to see that the "Settlement" and "Settlement/Liability Ratio" depend entirely on which assumptions are chosen. That in itself is unremarkable. But it follows that unless Dr. Bates' assumptions are credible and reliable, no confidence can be placed in his results. In fact, they are unproven and implausible: Dr. Bates' assumption for the "liability" is unrealistically small because the chance he allows for plaintiffs' victory at trial is much lower than Garlock's relevant experience can justify.[67] His assumption that the plaintiff has only negligible avoidable costs is controverted by the economic literature and by any realistic understanding of the economics of contingent-fee litigation, and completely overlooks the impact on plaintiffs of risk aversion and delay. Flowing from these unfounded

[67] Committee Br. at 63-64.

assumptions, Dr. Bates' "Settlement/Liability Ratio"—his conclusion that the settlement amount will be a multiple of "liability"—is not reliable. Given the heavy-handed way in which he plays with the model, his opinion boils down to the proposition that if trials are costly for Garlock but cost-free for plaintiffs, then Garlock's settlements are about nothing other than avoiding defense costs.

To say the least, Dr. Bates did not select his assumptions to replicate real-world conditions in the past or reasonably anticipated in the future. These considerations reinforce Judge Fitzgerald's findings in *Bondex* that the Bates White estimation method[68] is designed to minimize debtors' liabilities,[69] and that it would be inappropriate in estimation to reinterpret a bankrupted asbestos defendant's prepetition settlements from the unilateral perspective of the

[68] Dr. Bates has admitted that the estimation method his firm used in the *Bondex* estimation was essentially the same as the one he used in the proceeding at bar. Hr'g Tr. 2874:20-2876:6, Aug. 5, 2013 (Bates).

[69] *In re Specialty Prods. Holding Corp.* ("***Bondex***"), 2013 WL 2177694, at *18 (Bankr. D. Del. May 20, 2013). It is quite telling that Garlock advocates for discounting the mesothelioma estimate at a risk-laden rate (Garlock Br. at 106-07, 145-50; *see* Rebuttal Report of Karl N. Snow, Ph.D., dated Apr. 23, 2013 ("**Snow Rebuttal Report**") (GST-7239), rather then by the risk-free rate mandated by law and fairness. Using a risk-free rate is important because tort claimants are involuntary creditors, not investors who voluntarily choose to expose themselves to investment risk. The Supreme Court considered the appropriate discount rate for use with tort victims in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537 (1983), and concluded that, for example, with respect to lost wages, an injured person is entitled to a "risk-free" stream of future income. The Court further ruled that "the discount rate should not reflect the market's premium for investors who are willing to accept some risk of default." *Id.* Dr. Snow's proposals for discount rates based on, for example, investment returns of various funds or trusts, or on the internal rate of return of the Debtors, violate this principle by imposing a risk of default on the injured party. As the Second Circuit observed, when calculating inflation and discount rates, "[e]conomics should not be an instrument for the undercompensation of plaintiffs." *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 38 (2d Cir. 1980). *See also* Expert Report of Kenneth W. McGraw, dated Feb. 15, 2013 (ACC-937) at 3-9; Rebuttal Report of Kenneth W. McGraw, dated Apr. 22, 2013 (ACC-943) at 3.

debtor.[70] In reality, its settlements were *mutual* agreements in which the defendant and the plaintiffs reconciled clashing interests and opposing goals. What Garlock now finds convenient to recharacterize as cost avoidance was the payment of indemnity to compensate plaintiffs for injuries and to hedge against the risk of being forced to pay much greater sums under disastrous verdicts.

EnPro's 10-Ks reported Garlock indemnity estimates and defense costs separately for a reason—Garlock recognized both trial risk and costs.[71] Garlock's internal settlement deliberations, memorialized in its revealing "MEAs," show great fear of the risks of trial.[72] They speak, for example, of the dangers posed to Garlock by outstanding trial counsel on the plaintiffs' side;[73] of hostile jury pools and unfavorable venues such as Los Angeles [74] and New York City; [75] of a trial court that viewed Garlock as having a duty to warn of hazards in the environment in which its products were used, which Garlock took as inviting juries to punish it for exposures that workers sustained in cutting through insulation to work with its gaskets;[76] of the perils of running Garlock's "chrysotile" defense when a co-defendant at trial would tell the jury that the defense smacked of fraud;[77] of the risk that there might be few if any co-defendants

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[70] *Bondex*, 2013 WL 2177694, at *19.

[71] *E.g.*, ACC-149 (EnPro Indus., Inc. 2007 Form 10-K) at 32-33.

[72] *See also* Committee Br., Appendix II at 14-15, 18; Hr'g Tr. 3240:20-3241:5, Aug. 6, 2013 (Magee) (discussing ACC-767); *id*. at 3249:21-3250:6 (discussing ACC-770).

[73] ACC-334 (MEA/Reed); ACC-331 (MEA/Ornstein).

[74] ACC-341 (MEA/Williams).

[75] ACC-326 (MEA/Flynn); ACC-320 (MEA/Beltrami).

[76] ACC-754 at GST-EST-0556312-16 (MEA/Brown, MEA/Hicks, and MEA/Crockett).

[77] ACC-341 (MEA/Williams); *see* Hr'g Tr. 3332:5-7, Aug. 6, 2013 (Magee) ("Q. In any event, Kelly-Moore took the position, and that didn't help Garlock at all in the case. A. Absolutely not. You're absolutely correct.").

at trial to share an adverse verdict.[78] The MEAs point to the "enormous risk" of multimillion compensatory verdicts;[79] the specter of multiple trials against groups of sympathetic plaintiffs with large economic losses, where the likely alternative to settlement would be a group of verdicts adding up to one billion dollars.[80] And in addition to these hazards, the MEAs underscore that Garlock faced claimants under the specter of potential verdicts for punitive damages.[81]

In managing claims, Garlock saw the world with unclouded eyes, and the vision was nothing like the picture it paints for estimation. Compared to running the risks of trial, Garlock's best interests almost always compelled it to settle, especially when it could negotiate arrangements for resolving large numbers of claims, as the MEAs show.[82] In light of this unvarnished evidence, Dr. Bates' claim that Garlock only settled cases to avoid defense costs simply shows that adherence to theory made his opinion impervious to facts.

"Econometricians, like artists, tend to fall in love with their models."[83] Dr. Bates has fallen victim to this syndrome. From the outset of his EnPro engagement in 2005, Dr. Bates advised that Garlock's settlement values would fall back towards those of earlier periods once

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[78] ACC-341; *see also* ACC-337 (MEA/Steckler).

[79] ACC-337 (Steckler).

[80] *See* ACC-766 (MEA/McMahon); ACC-767 (MEA/Jensen).

[81] *See* ACC-341 (MEA/Williams); ACC-337 (MEA/Steckler).

[82] ACC-327 (settling 102 claims for $15 million after receiving a $10.3 million verdict in the *Fowers* case). *See* Hr'g Tr. 3509:4-6, Aug. 7, 2013 (McClain) ("Every single case that I've had that's a good case against Garlock, Garlock would never let me try that case.").

[83] E. Leamer, *Let's Take the Con Out of Econometrics*, 73-1 Am. Econ. Rev. 31, 37 (Mar. 1983) (internal quotation marks omitted) (reproduced as Ex. C to this brief).

trusts for bankrupt defendants became operative and began to pay claimants. It did not happen,[84] as EnPro's Richard Magee acknowledged.[85] There was no reduction in the settlement values paid by Garlock or any other defendant, even though between 2006 and 2008 trusts paid claimants three times what they had paid over the past nineteen years.[86] Yet, in each of the quarterly and annual estimates of Garlock's asbestos expenditures that Dr. Bates delivered up until the company's bankruptcy, he gave as the preferred or "reasonable and probable" forecast a dollar range that *assumed* a material impact from trust payments[87]—an impact that was not discernible in the actual data. Characteristically, Dr. Bates put more faith in theory than in fact.

Also characteristically, when Garlock obtained discovery about resolved claims from the Delaware Claims Processing Facility ("**DCPF**"), which processes and resolves claims submitted to many different trusts, Dr. Bates declared his theory vindicated based on a superficial interpretation of the trust claim data. He announced that claimants who settled with Garlock

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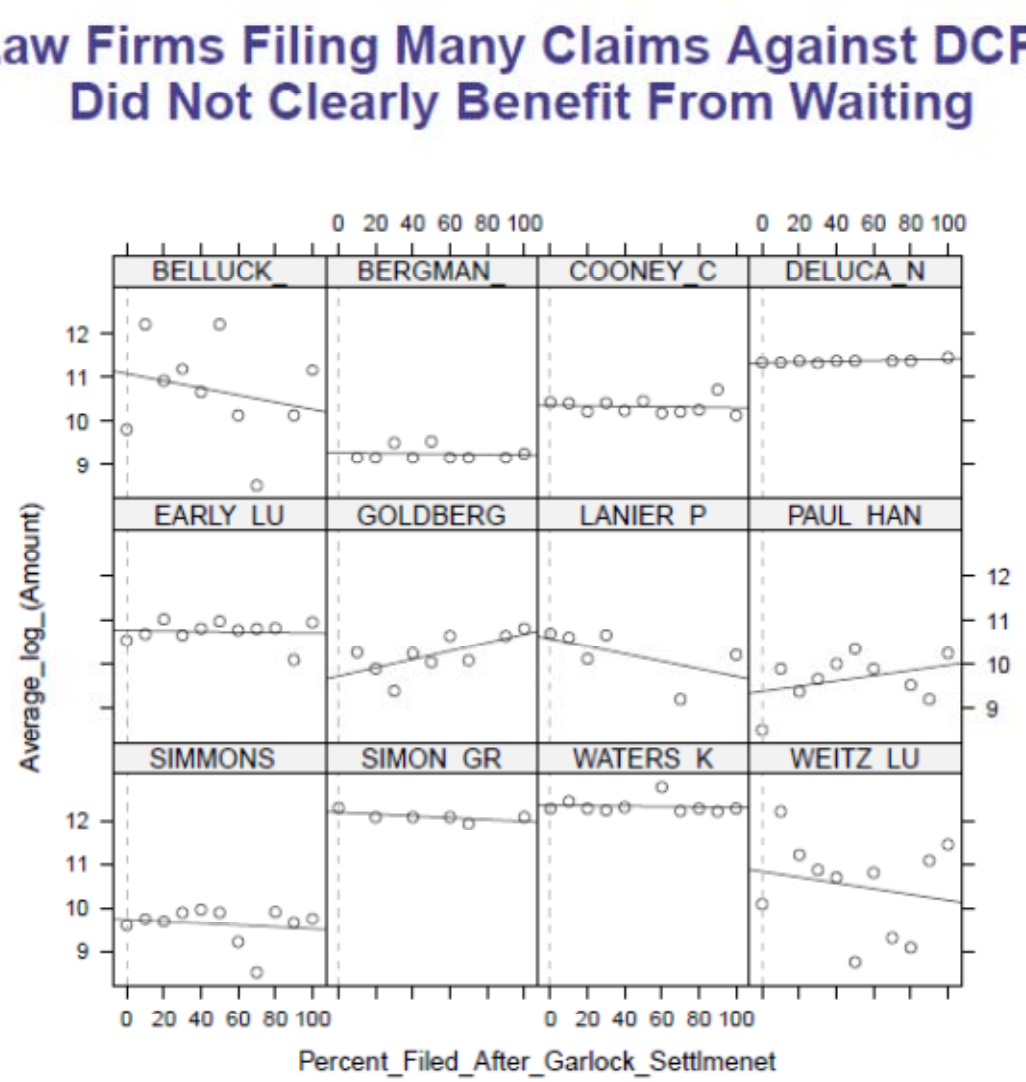
[84] No historical precedent that would lead one to expect that fractional recoveries available through trusts would dilute the settlement value of claims against solvent defendants. No such impact was felt when a trust emerged from the Manville bankruptcy in 1988. Hr'g Tr. 423:10-424:8, Oct. 15, 2010 (Peterson); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 751-52 (E. & S.D.N.Y. 1991), *judgment vacated on other grounds by* 982 F.2d 721 (2d Cir. 1992). No reduction in others' settlement values occurred when the Manville Trust resumed operations in 1998, having been restructured according to what has become the basic template for the distribution procedures of later-formed asbestos trusts. And no such reduction manifested itself in the 1990s when trusts began to pay claims in the place of reorganized tortfeasors such as Celotex, Eagle Picher, National Gypsum, and Keene, or when the members of the Center for Claims Resolution ceased to be protected by the stay imposed in the *Georgine* class action. Hr'g Tr. 452:21-457-7, Oct. 15, 2010 (Peterson).

[85] Hr'g Tr. 3372:17-3374:2, Aug. 6, 2013 (Magee).

[86] Hr'g Tr. 3867:7-13, Aug. 8, 2013 (Peterson); *see also* Hr'g Tr. 4075:21-4076:3, Aug. 9, 2013 (Peterson).

[87] Hr'g Tr. 4789:4-4790:22, Aug. 22, 2013 (Bates); ACC-20 at GST-EST-0122676; ACC-287 at GST-EST-0122664; ACC-291 at GST-EST-0122647; ACC-293 at GST-EST-0122640; ACC-144 at GST-EST-0122632.

after filing at least one trust claim received lower payments from Garlock than claimants who postponed the filing of all trust claims until after resolving their Garlock claims. But a more penetrating analysis of that data, presented at the Estimation Hearing by Dr. Peterson, showed that this generalization will not hold water. To make this point at the Estimation Hearing, Dr. Peterson presented the following line graphs,[88] to which we now add the names of the respective law firms:



[88] ACC-824a at 80; *see id.* at 79.

Where the lines moving across these squares are flat or descend from left to right, the firm on average collected *less* from Garlock when settling with Garlock on behalf of clients *after* submitting at least one claim to trusts, than it did when settling with Garlock before pursuing any trust claims.[89] The evidence squarely refutes Dr. Bates' theory. The vertical axis represents payment amount; the horizontal axis represents the percentage of trust claims filed after settling with Garlock, so that "0" means all trust claims were filed before making a settlement with Garlock and "100" means that all trust claims were postponed until after Garlock settled. The firms depicted were the ones that filed the greatest number of claims with DCPF trusts. If Garlock were right that firms systematically delayed filing trust claims while litigating against it, so as to avoid admitting clients' exposures to other manufacturers' products, the bubbles in the chart would cluster toward the right-hand side of the boxes for each firm. But the actual distribution of bubbles in each box shows that Garlock's complaint has no basis in fact: None of the firms systematically postponed trust claims. Only two of them (Goldberg and Paul & Hanley) show ascending lines, indicating that they tended to collect more from Garlock when settling with it before filing trust claims. The chart, however, does not suggest that those two firms had any consistent practice of postponing trust claims. And it demonstrates that the other firms' clients fared worse when they settled with Garlock before filing a trust claim—the very opposite of what Garlock and Dr. Bates have represented.

The following tabulation, based on data from the Garrison database and data produced to Garlock by the DCPF, illustrates in a different way the reality that lies behind the line graph. Unlike the line graph, the tabulation does not capture information as to what percentage of trust

[89] Hr'g Tr. 3965:4-20, 3968:25-3969:25, Aug. 8, 2013 (Peterson); ACC-824a at 80.

claims came before Garlock settlements and what percentage after. Instead, it adopts Dr. Bates' way of categorizing Garlock settlements, dividing them into two categories: (i) Garlock settlements made before the settling claimant had filed *any* trust claims with DCPF, and (ii) all other Garlock settlements.

More Law Firms Saw Deceases in Average Settlements For Claims Settled with Garlock Before Any DCPF Filing

Saw Decreases			Saw Increases		
Firm	Filed Before	Filed After	Firm	Filed Before	Filed After
BARON BU	$458,500	$125,714	BELLUCK	$84,167	$99,740
BERGMAN	18,074	10,673	CAROSELL	58,000	200,000
BRAYTON	29,100	13,167	CLAPPER	42,000	47,500
BROOKMAN	103,889	40,000	DELUCA N	84,620	98,809
COONEY C	33,346	28,542	EARLY LU	56,557	71,646
GERTLER	76,500	76,250	GOLDBERG	27,432	41,346
GOLDENBE	33,259	24,254	GORI JUL	55,933	58,500
LANIER P	70,156	28,333	KELLEY F	24,000	24,548
LEVIN SI	134,167	95,000	LIPSITZ	29,912	60,000
LEVY PHI	65,727	62,286	NESS MOT	15,167	21,300
MAUNE RA	53,333	46,944	PAUL HAN	34,412	40,556
NICHOLAS	15,000	15,000	SHEPARD	20,714	131,667
PATTEN W	206,061	141,666	SIMMONS	29,200	29,500
ROGER WO	218,750	214,583	SIMON GR	202,500	216,316
SAVINIS	48,000	38,462	WATERS K	214,250	222,480
SCHROETE	15,250	6,000	WEITZ LU	107,879	124,423
SHEIN LA	450,000	229,545			
SIEBEN P	31,192	9,167			
TERRELL	49,446	42,000			

Note: Averages of settled Garlock claims based on law firms with two or more claimants filing against DCPF both before and after settling with Garlock.

The firms on the left-hand side of the table ("Saw Decreases") collected *more* on average when settling with Garlock after submitting at least one trust claim than *vice versa*, contrary to Dr. Bates' supposition. Several of them, including Baron & Budd, the Lanier Firm, the Patten Wornom firm, and the Shein Law Center, appear on Garlock's "RFA 1 List." That is the interrogatory response by which Garlock identified firms that it alleges extracted inflated settlements by such stratagems as refusing to own up to trust claims. But the data run counter to that contention. The disparity is particularly marked in dollar terms for Baron & Budd and the

Shein Law Center, two of the firms Garlock has criticized most bitterly as supposedly guilty of systematic "suppression of evidence." Just as notable, however, is the information conveyed by the right-hand side of the table concerning firms that supposedly won higher settlements with Garlock ("Saw Increases") by putting off trust claims: The Shepard firm, the Simmons firm, and Weitz & Luxenberg all had standing group settlement arrangements with Garlock that made the identification of alternative sources of asbestos exposure utterly irrelevant to the amount paid.[90] It must be happenstance and nothing more that their average Garlock settlements were slightly higher when made before trust claims were filed; their Garlock deals gave those firms no incentive whatsoever to time clients' trust claims strategically in relation to Garlock settlements.[91] For the Simon and Waters & Kraus firms, both of which Garlock intemperately attacks, the table shows increases in average Garlock settlements associated with clients who pursued no trust claim until after extracting those settlements, with the Simon firm gaining $13,816 and the Waters & Kraus firm $16,500. But those marginal differences are hardly indicative of the drastic effects Garlock attributes to alleged discovery misconduct by plaintiffs and their lawyers. And, as we have shown elsewhere, the proof has not sustained those allegations either.[92]

In defiance of the facts, Dr. Bates still insists on his theory. This is not science.

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[90] *See* O'Reilly Dep. 127:3-5, Feb. 22, 2013; Shepard Dep. 65:7-22, 165:16-22, Dec. 4, 2012; Henzel Dep. 87:3-10, 90:16-19, 134:9-14, Nov. 14, 2012. *See generally* Drake Dep. 165:6-22, Nov. 7, 2012; Hennessy Dep. 91:7-92:1, Jan. 21, 2013.

[91] In his rebuttal testimony, Dr. Bates conceded that claimants generally have reason to pursue trust claims as soon as possible. Hr'g Tr. 4855:18-23, 4856:2-12, Aug. 22, 2013 (Bates). This is true, and by itself does much to undermine Garlock's revisionist interpretation that trust payments should have diminished the settlements it paid in the latter half of the 2000s.

[92] Committee Br. at 30-44 & Appendix II.

III. GARLOCK CANNOT REWRITE ITS PAST

A. Garlock's Verdicts in *Messinger*, *Dougherty* and *Davis* Did Not Depend on Trust Claims

Garlock claims that in the *Messinger*, *Dougherty*, and *Davis* cases, it "compelled the production of Trust claims and was able to present its full defense at trial," and thus "won defense verdicts."[93] This convenient theory reduces to an assertion that Garlock's success in those cases can only be explained by its having obtained trust information. In fact, the partial records available suggest that Garlock won those cases for other, more typical reasons.

With respect to the *Messinger* case, Garlock has not placed the trial transcript into the record nor demonstrated that the trust claims were even admitted into evidence. It relies solely on Mr. Turlik to talk about the result. In cross-examining Mr. Turlik and others at the Estimation Hearing, and in its opening brief and Appendix II to that brief, the Committee has shown that the accounts of particular cases given by Garlock and its witnesses are heavily slanted. The Court can evaluate Mr. Turlik's uncorroborated interpretations.[94]

The verdict form for *Dougherty* is in the record, but it contradicts Garlock's assertion that the reason for the defense verdict was Garlock's introduction of trust claim forms at trial. Rather, the defense verdict appears to have resulted from the absence of evidence that Mr. Dougherty was exposed to any fibers from Garlock's gaskets. Indeed, the jury found that he had failed to show exposure to fibers for which *any* defendant was responsible.[95] Garlock's own Trial Evaluation Form for *Dougherty*, prepared shortly before the trial, notes that the plaintiff had not identified any Garlock product, and Mr. Dougherty testified in his deposition that he did

[93] Garlock Br. at 25.

[94] *See, e.g.*, Hr'g Tr. 2258:1-2259:22, 2263:8-13, July 31, 2013 (Turlik).

[95] *See* Hr'g Tr. 2444:8-2445:18, Aug. 1, 2013 (Turlik).

not believe he had been exposed to asbestos at his worksites.[96] Mr. Turlik claimed in this Court that Mr. Dougherty's attorney presented exposure evidence through a co-worker in the trial of the tort suit, but nothing in the estimation record bears out his say-so. Garlock did not produce the trial transcript in estimation discovery, and the only co-worker whose deposition is in the record did not identify Garlock gaskets.[97] Mr. Turlik's insistence that it must have been Garlock's introduction of trust claims that led the jury to decide for Garlock[98] is entirely conjectural.

As for *Davis*, Garlock first asserts—without citation to the record—that Mr. Davis and his attorneys "refused to produce [t]rust claim forms evidencing such exposures."[99] Garlock claims the trial court compelled Mr. Davis to produce trust claims to the Manville, Celotex, H.K. Porter, UNR, and Eagle Picher trusts,[100] and that Garlock obtained a defense verdict in the January 2004 *Davis* trial after introducing the trust claims into evidence.[101] But the documents do not support either aspect of Garlock's account. As early as September 19, 2003, in response to a request for disclosure, the *Davis* plaintiffs disclosed payments from several trusts: Manville, Celotex, UNARCO, Eagle Picher, HK Porter, and Combustion Engineering.[102] And on January

[96] *See* Hr'g Tr. 2442:7-2443:23, Aug. 1, 2013 (Turlik). *See also* ACC-315 (TEF/Dougherty); GST-2072 (Dougherty Dep. May 14, 2007) at 50:1-9.

[97] *See* ACC-6016 (Tucker Dep. Apr. 28, 2008).

[98] *See* Hr'g Tr. 2446:2-15, Aug. 1, 2013 (Turlik).

[99] GST-7079 (RBH Memo, Apr. 12, 2013) at 16.

[100] GST-8011 (Garlock Appendix) at 56, citing GST-2041, GST-2042 & GST-2043 (Plaintiff's Production of Trust Claim Forms, dated Jan. 5, 2004).

[101] *Id.* at 56; ACC-519 Ex. B, at 5.

[102] *See* ACC-6014 (First Supplement to Second Amended Responses to Defendants' Request for Disclosures, dated Sept. 19, 2003) at GST-EST-0144437.

6, 2004, the Davis' attorney provided the trust claim forms to Garlock's attorneys.[103] There is nothing in the estimation record to show when Garlock requested disclosure of the trust claims, and no document suggesting that the *Davis* plaintiffs had to be compelled by the court to produce the trust claims.

Nor does the record support Garlock's claim that the trust claim forms account for its defense verdict in *Davis*. It appears instead that the plaintiffs simply failed to meet their burden of proof. Although Garlock does not mention it, the jury in the *Davis* case did not find negligence as to any of the fifteen asbestos manufacturers listed on the verdict form—including the bankrupts Manville, Celotex, H.K. Porter, UNR, and Eagle Picher—so no one was held responsible for Mr. Davis' mesothelioma.[104] Garlock did not use trust claims to shift the blame to bankrupts. There was no blame to shift.

B. Garlock's Ever-Shrinking Claims of "Evidence Suppression" Fail[105]

Garlock maintains that plaintiffs or their counsel have engaged in a "widespread practic[e]" of "omitting exposure in significant cases."[106] Its evidence for this assertion, however, evaporates with scrutiny. Garlock spent much of last year investigating 26 "RFA 1.A"

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[103] *See* GST-2028 (Davis Trial Tr.) at 12:3-12.

[104] *See* ACC-351 (Davis Charge of the Court, dated Feb. 4, 2004) at GST-EST-0111936-41.

[105] Garlock itself has sometimes faced allegations that it suppressed evidence relating to the testing of its asbestos products. *See, e.g.*, *Garlock Sealing Techs., LLC. v. Robertson*, 2011 WL 1811683, at *7, 10 (Ky. Ct. App. May 13, 2011) ("[T]he estate also notes that it presented evidence that Garlock interfered with testing of its gaskets to minimize the appearance of the risk to which pipefitters were exposed."); ACC-180 (Whittaker Dep.) at 83:9-85:20, 85:22-24, 86:6-7, 86:9-13, 86:20-87:3, 87:7-88:5, 88:12-13, 88:18-89:15, 89:22-90:8, 91:3-5, 91:8-94:16, 94:22, 94:25-96:3, 96:7-11, 96:16-19, 96:21-97:2, 97:6-99:15, 100:17-22, 101:2-3, 101:7-102:20, 102:22-23. The Court, however, cannot be expected to increase Garlock's settlement values on that account for estimation purposes. Garlock's allegations of "suppression" by plaintiffs are likewise irrelevant here.

[106] Garlock Br. at 47.

cases, out of the thousands it resolved, that it contended were tainted by non-disclosure. By the Estimation Hearing, this group had shrunk to 15 so-called "Designated Cases." Now, in its latest brief, Garlock is down to five: Robert Treggett, Oscar Torres, Peter Homa, Howard Ornstein, and Vincent Golini. We have provided a detailed counterstatement to Garlock's characterization of the evidence regarding the cases of all Designated Cases in Appendix II to the Committee's initial brief.[107] To avoid repetition, we respectfully refer the Court to that discussion and respond to Garlock's argument in summary fashion here.[108]

Garlock lost *Treggett* because the jury did not believe its defenses, not because of matters it dreamed up years later. One of Garlock's MEAs laments that, in *Treggett*, Kelly-Moore, a co-defendant, had "severely undermined one of [Garlock's] chief defenses, *i.e.*, the chrysotile defense," because, even though Kelly-Moore was itself "a low dose defendant that made chrysotile products, [it] concedes to juries, contrary to Garlock's position, that chrysotile can cause mesothelioma, and states further that to contend otherwise is suggestive of fraud."[109]

Garlock's allegations that Mr. Treggett concealed exposure information and Waters & Kraus engaged in "calculated fraud"[110] are false and irresponsible. Mr. Treggett described extensive exposures to asbestos-containing insulation and other products in discovery and at

[107] *See* Committee Br., Appendix II. The full extent of Garlock's distortion of its Designated Cases can only be appreciated by a close reading of the cited Appendix in its entirety. The five cases featured in Garlock's Post-Trial Brief, are discussed in that Appendix at 2-10 (Treggett), 49-55 (Torres), 38-46 (Homa), 29-33 (Ornstein), and 64-67 (Golini).

[108] A short supplement to the Reservation of Objections [Dkt. No. 3199], filed by the Committee on November 1, 2013, is attached as Appendix B.

[109] ACC-341 (MEA/Williams).

[110] Garlock Br. at 38-39.

trial.[111] His expert, Dr. John Templin, testified that "Asbeston" insulation blankets were the asbestos-containing products with which Mr. Treggett came into contact most often.[112] Garlock's own appellate brief in *Treggett* acknowledged that Mr. Treggett had admitted to "massive exposure to insulation or 'lagging'" on the USS Marshall, that he was present when insulation was "removed and replaced" from "'miles' of pipes" on that ship during an overhaul, that the "dust from the lagging covered his clothes and hair," and that he "was not only in the presence of other workers while they removed the lagging, but he removed lagging himself during three percent of his work."[113] Even now Garlock does not contend that Mr. Treggett or his attorneys had any actual evidence that they did not disclose to Garlock,[114] but it strains to cover the gaping holes in its allegations by exaggerating the significance of a bankruptcy ballot[115] and trust claims that rested on the same facts that Mr. Treggett disclosed in his tort suit. Given Garlock's own insistence that Unibestos must have been present on the ship where Mr. Treggett served, it can hardly contend that Waters & Kraus lacked grounds for a reasonable belief that its client may have a claim against the trust. That is all that a ballot requires,[116] but

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[111] *See* Committee Br., Appendix II at 3-4.

[112] *See id.* at 7 (citing ACC-795 (Garlock Appeal Brief, Treggett) at 28 and GST-5446 (Treggett Trial Tr.) at 1930:18-23). Garlock, however, missed the opportunity to have Asbeston placed on the verdict sheet because the judge ruled that it had failed to establish the corporate identity of the company that manufactured the blankets. *See id.* (citing GST-5438 (Treggett Trial Tr.) at 5407:12-22).

[113] *See id.* at 4 (citing ACC-795 (Garlock Appeal Brief) at 26).

[114] *See* Committee Br., Appendix II at 6.

[115] Garlock has not demonstrated that the ballot cast for Mr. Treggett in the Pittsburgh Corning bankruptcy could have been introduced in the *Treggett* trial as evidence of exposure to Unibestos. Indeed, it has not shown that a bankruptcy ballot has ever been admitted as evidence of anything in any tort suit. *See* Committee Br. at 41-42.

[116] Hr'g Tr. 3709:5-3710:20, Aug. 7, 2013 (Patton). *See* Committee Br. at 37-39. Garlock's various citations in its brief to Mr. Patton's testimony are inaccurate and misleading. For *(Footnote continued on next page.)*

counsel's "reasonable belief" would not prove that Mr. Treggett actually encountered Unibestos, much less that the product came into his "breathing zone," as Garlock's witnesses admitted was its burden in seeking to allocate liability to the empty chair in the tort system.[117]

With regard to three Designated Cases, *Treggett*, *Torres*, and *Homa*, Garlock complains that plaintiffs' counsel acted improperly by challenging at trial Garlock's alternative exposure allegations.[118] This is absurd. Counsel were only doing their duty as advocates to ensure that any entity for which Garlock lacked sufficient evidence to meet the legal standard at trial stayed off the verdict form. Garlock's counsel was just as zealous in holding plaintiffs to their own burden of proof, for example, even challenging Mr. Treggett's identification of Garlock's gaskets and disputing that they contained asbestos, although Garlock knew they were widely used in the Navy and Garlock's own expert's admitted the asbestos contents of those products.[119] This is what lawyers do at trial. It is not fraud.

Garlock indulges in magical thinking when it says evidence in Mr. Torres' trust claims would have convinced the jury that "Mr. Torres' mesothelioma was caused not by Garlock

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(Footnote continued from previous page.)
example, Garlock says Mr. Patton "admitted that . . . [a] claimant casting a ballot must have a good faith basis to believe he was exposed to the debtor's product." Garlock Br. at 100-101. In fact, Mr. Patton testified that the claimant need only have a good faith basis to believe he or she will be able to assert a claim to the trust. *E.g.*, Hr'g Tr. 3759:12-19, Aug. 8, 2013 (Patton). Elsewhere Garlock says Mr. Patton admitted that the confidentiality and sole benefit provisions in trust distribution procedures were "intended to" increase plaintiffs' negotiating leverage against tort system co-defendants. Garlock Br. at 26. Mr. Patton made no such statement about what those provisions were "intended" to do. In fact, he explained that the trusts sought the provisions to increase the trusts' leverage with plaintiffs and for several other purposes. Hr'g Tr. 3753:4-6, 3754:13-24, Aug. 8, 2013 (Patton).

[117] Hr'g Tr. 2380:11-23, Aug. 1, 2013 (Turlik); Hr'g Tr. 3300:18-3301:3, Aug. 6, 2013 (Magee).

[118] Garlock Br. at 38-39 (Treggett); *see id.* at 35 (Homa), 45 (Torres).

[119] *See* Committee Br., Appendix II at 6 (citing Hr'g Tr. 3320:3-20, Aug. 6, 2013 (Magee); GST-5444 (Treggett Trial Tr.) at 1212:6-20; GST-5450 (Treggett Trial Tr. (Sawyer)) at 3360:18-21).

gaskets but by insulation products, including Kaylo pipe covering manufactured by Owens Corning."[120] The case against Garlock was strong. Mr. Torres and another witness testified to Mr. Torres' exposures to Garlock's 7705 gaskets, which contain crocidolite—what Garlock itself considers the most deadly form of asbestos (as Garlock has asserted in the *Williams Kherkher* adversary proceeding). In its internal memorandum evaluating *Torres* before trial, Garlock acknowledged the strength of Mr. Torres' evidence of exposure to Garlock's crocidolite gaskets.[121] Mr. Torres' expert provided a lung fiber analysis showing that both amosite and crocidolite fibers were present in his lungs. Although the fiber analysis was proof of Mr. Torres' exposure to amosite as well as crocidolite, Garlock moved, unsuccessfully, to exclude that evidence from trial.[122] In other words, Garlock itself sought to "suppress" physical evidence that Mr. Torres had exposures to amosite products Garlock did not make, because it feared the proof that he had also breathed in crocidolite from Garlock products.

Garlock's insistence that Mr. Torres "denied exposure to other products"[123] is false. The evidence showed that the only asbestos products Mr. Torres handled *directly* were Garlock's crocidolite gaskets, but Mr. Torres and other witnesses freely disclosed during discovery and at trial that he also suffered massive exposures to other asbestos-containing products, including insulation.[124] In his interrogatory responses, Mr. Torres described working in close proximity to insulators who sawed and cut insulation and created "thick and heavy" dust and "dust cloud-like

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[120] Garlock Br. at 44-45.

[121] *See* Committee Br., Appendix II at 49-50; ACC-311 (TEF/Torres) at GST-EST-0556238.

[122] *See* ACC-6203 (Transcript re Garlock's Motion in Limine, dated Feb. 8, 2010) at GST-EST-0393632-33; ACC-311 (TEF/Torres) at GST-EST-0556239.

[123] Garlock Br. at 44; Hr'g Tr. 3082:19-20, Aug. 5, 2013 (Magee).

[124] *See* Committee Br., Appendix II at 50-52.

conditions."[125] He also described "periods of large exposure during shutdowns and projects where insulation was stripped off large areas," creating "clouds of dust."[126] A witness for Mr. Torres testified upon deposition that Kaylo insulation, an Owens Corning product, as well as insulation products produced by numerous other bankrupts, including Johns-Manville, Celotex, Carey, and A.P. Green, were present at the Union Carbide plant and used in the presence of pipefitters.[127] In its internal trial evaluation, Garlock acknowledged that "several witnesses ha[d] testified that Plaintiff was exposed to large amounts of dust from asbestos-containing pipe insulation."[128]

Garlock convinced the trial court to list Owens Corning and Johns-Manville, along with Brown & Root (Mr. Torres' employer), Union Carbide, and Garlock on the *Torres* verdict sheet. But, while Garlock successfully placed 45% of the responsibility on Union Carbide, and 10% on Brown & Root, it failed to convince the jury that Owens Corning or Johns-Manville also shared responsibility for causing Mr. Torres' mesothelioma.[129] In suggesting to this Court that Mr. Torres' counsel made a "representation" that his client was not exposed to Owens Corning products, Garlock itself is guilty of a misrepresentation. The lawyer merely argued to the jury that Garlock alone should be held responsible for a failure to warn, because Owens Corning and Johns Manville had ceased making or selling asbestos-containing products before Mr. Torres

[125] GST-4926 (Seventh Am. Interr. Resp.) at GST-EST-0536290.

[126] *Id.*

[127] *See, e.g.*, ACC-6201 (Weikel Dep.) at 193:21-194:11, 195:18-196:18, 197:15-20, 200:14-201:16.

[128] ACC-311 (TEF/Torres) at GST-EST-0556238.

[129] ACC-393 (Torres Charge of the Court) at ACC-EST-0014493-97.

began working at the plant.[130] That he persuaded the jury to assign no fault to Owens Corning is in no way inconsistent with the Owens Corning trust claim subsequently filed on Mr. Torres' behalf. That claim, along with the DII (Halliburton) and Babcock & Wilcox trust claims, were site list claims based on presumptions established by those trusts.[131] Trust claims filed under such presumptions contained no facts bearing on exposures that had not already been provided to Garlock in the tort suit.[132]

Garlock also had ample evidence of other exposures in *Homa*. In discovery, Mr. Homa disclosed the various ships on which he was stationed and testified that he was exposed to asbestos pads and insulation on boilers, pipes and valves.[133] His own expert witnesses testified at trial that amosite insulation was used in the boiler rooms and elsewhere on the ships where Mr. Homa served, and that he would have been exposed to the dust from those products, which could contribute to causing mesothelioma.[134] His trial counsel, Belluck & Fox, provided Garlock with certified ship records that detailed the machinery and equipment used on the ships on which Mr.

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[130] *Id.* at ACC-EST-0014494; GST-4860 (Torres Trial Tr. Mar. 4, 2010) 58:13-18.

[131] Committee Br. at 37-39.

[132] *See* GST-4929 (Torres OC Trust Claim); GST-4928 (Torres DII (HAL) Trust Claim). Garlock complains that the Babcock & Wilcox claim was not disclosed in discovery, although it was filed the day before Mr. Torres' deposition. But Mr. Chandler testified that he had not been aware of the claim at the time of Mr. Torres' deposition, and subsequently determined that it was a "bare-bones" claim that had been filed to protect Mr. Torres' rights because a tolling period was coming to an end. Committee Br., Appendix II at 52-53; Williams Kherkher 30(b)(6) Dep. (Chandler) 46:19-47:5, Jan. 11, 2013. The claim was deferred, and remained unperfected until after Mr. Torres' death, in September 2011. Williams Kherkher 30(b)(6) Dep. (Chandler) at 67:1-19; 68:5-9, Jan. 11, 2013.

[133] *See* Committee Br., Appendix II at 40-41.

[134] *See, e.g.*, GST-3616 (Trial Tr. Apr. 29, 2009) at 209, 218-21 (Moline); GST-3617 (Trial Tr. Apr. 30, 2009) at 280-81 (Moline); GST-3618 (Trial Tr. May 1, 2009) at 457, 484-87, 507, 509 (Hatfield); GST-3619 (Trial Tr. May 4, 2009) at 573-74 (Hatfield).

Homa served and showed the presence of asbestos insulation products.[135] Garlock admits that it introduced many of these records at trial, and used them in conjunction with expert testimony to demonstrate that products manufactured by bankrupt companies were present on the ship.[136] Furthermore, Garlock took the position that there was enough evidence to persuade the jury to allocate responsibility to almost six dozen other entities, including several bankrupts: its proposed verdict form listed not only Babcock & Wilcox, which Mr. Homa had identified in his deposition, but also Combustion Engineering, Eagle Picher, Keene, and "UNARCO (Unibestos) Insulation."[137] For strategic reasons, apparently, Garlock chose not to name Flexitallic or DII (Halliburton) on the verdict sheet, even though Mr. Homa had disclosed exposures to gaskets and pumps made by those companies.[138]

Garlock's lawyers had the same tools as Mr. Homa's attorneys to identify potential trust claims, many of which were based on the trusts' publicly-available approved site lists.[139] Mr. Homa was a boilermaker and shipfitter at the Brooklyn Navy Shipyard, a site where thousands of workers were exposed to asbestos, and one that is included on the approved site lists of many trusts.[140] Garlock had available to it the depositions of hundreds, if not thousands, of Brooklyn Naval Shipyard employees who testified in the New York City Asbestos Litigation; indeed,

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[135] *See* Belluck & Fox 30(b)(6) Dep. (Belluck) 190:13-17, 205:3-21, 211:12-22, Dec. 14, 2012. *See also* ACC-6592-7354 (ship records).

[136] *See* Garlock Br. at 36; GST-8011 at 13 n.5.

[137] *See* ACC-385 (Garlock's Proposed Verdict Sheet in *Homa*).

[138] *See* Garlock Br. at 35.

[139] *See* Committee Br., Appendix II at 43.

[140] *See, e.g.*, ACC-492f (AWI Site List) at 58; ACC-492g (B&W Site List) at 91; ACC-492j (Combustion Engineering Site List) at [pdf page] 22; ACC-492*l* (Eagle Picher Site List) at 33; ACC-492s (FB Site List) at 42; ACC-492k (DII (HAL) Site List) at 102; ACC-492q (Keene Site List) at 6; ACC-492r (OC Site List) at 488; Committee Br., Appendix II at 44-45.

Garlock issued notice of its intent to introduce into evidence in *Homa* several of those depositions from previous cases in which insulation products were identified.[141] For example, Marvin Zatz testified to the presence of Manville and Corning insulation products at the Brooklyn Navy Yard.[142] Even if co-worker depositions from previous cases would have been inadmissible hearsay in the *Homa* trial, Garlock's experts could certainly have relied on them for opinions about alternative exposures, as Mr. Turlik admitted.[143]

Garlock's recharacterization of *Ornstein* is likewise strained. Garlock focuses on Mr. Ornstein's deposition testimony that he did not work in the engine room or boiler room on the USS Estes, and that he did not see pipe insulation being removed or installed while the ship was being overhauled.[144] But Mr. Ornstein stated in his interrogatory responses and in his deposition that he saw insulation being removed from pumps and valves on the USS Estes, which created respirable asbestos dust.[145] He also testified in his deposition that he stood fire watch during the ship's overhaul. Mr. Glaspy testified at the Estimation Hearing that Garlock was well aware that amphibole insulation was used throughout the ship.[146] And Garlock received a report from Rushworth Consulting noting that "[o]verhauls inevitably involve removal and reinstallation of machinery and piping insulation during which time, asbestos dust levels routinely reach 10's or 100's of fibers per centimeter cubed (f/cc)."[147] The report also noted that during cleanup,

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[141] *See* ACC-514 (Garlock's Supplemental Fact Witness Disclosure).

[142] *See* ACC-7642 (Zatz Dep. Feb. 4, 2005) at 261:20-22 [pdf page 72].

[143] *See* Hr'g Tr. 2348:21-23, Aug. 1, 2013 (Turlik). *See also, e.g.*, ACC-514 (Garlock's Supplemental Fact Witness Disclosure).

[144] *See* Garlock Br. at 41-43.

[145] *See* GST-3741 (Ornstein Interrogatory Responses) at GST-EST-0512293-94.

[146] Hr'g Tr. 4575:21-24, Aug. 22, 2013 (Glaspy).

[147] GST-0918 (Rushworth Report) at [pdf page] 25.

"asbestos dust levels reached as high as 1,000 f/cc," much of which was amosite fiber, and that while standing fire watch during the overhaul, Mr. Ornstein would have been periodically exposed to such levels.[148]

Mr. Ornstein's inability to identify specifically the particular products to which he was exposed is hardly surprising, given the nature of his work.[149] Five of the trusts to which he submitted claims include on their site lists his ship, the USS Estes, and the Long Beach Naval Shipyard, where he was stationed. Mr. Ornstein's claims to two other trusts also cite to his work in the Navy and are accompanied only by discovery materials that had already been provided to Garlock in the tort suit.[150] No objective evidence supports Mr. Glaspy's testimony that if he had been given "access to this evidence when the case was pending, 'I never would have recommended my client settle this case for $450,000, far from it.'"[151] More concretely, Mr. Glaspy admitted that, in negotiating with Simon Eddins, his focus was on reaching group deals, imposing annual caps on the amount that would be paid to the firm's clients, and lowering the average settlements.[152] That approach does not imply the intense focus on other exposures that Garlock would now read back into the situation.

In fact, Garlock settled *Ornstein* in a group settlement as one of nineteen other Simon Eddins cases slated for trial. Garlock's own internal settlement evaluation shows that its main

[148] *Id.*

[149] *See* Committee Br., Appendix II at 31.

[150] *See id.* at 32-33.

[151] Garlock Br. at 43, citing Hr'g Tr. 4562:7-8, Aug. 12, 2013 (Glaspy).

[152] *See* Hr'g Tr. 4620:9-17, Aug. 22, 2013 (Glaspy).

concerns were that Mr. Ornstein had identified Garlock products,[153] that Garlock "ha[d] been heavily identified in the past" in cases involving the US Navy, and that the case was a "high risk" with a "high verdict potential," "in an extremely bad jurisdiction, being handled by some [of] the best trial lawyers in the country," including Ron Eddins, formerly of Waters & Kraus, who was "the trial attorney [who] obtained the large verdict and punitive damages award against Garlock in the Treggett case."[154] Plaintiff's tort counsel, Jeffrey Simon, testified at deposition that during discovery in *Ornstein*, to all appearances, "Garlock was not very interested in what [Mr. Ornstein's] thermal insulation exposures were."[155] The documentary evidence of Garlock's outlook at the time corroborates that the presence or absence of "other exposure" evidence had little to do with its *Ornstein* settlement.

Discovery in the *Golini* case disclosed extensive exposure to numerous asbestos-containing products, including insulation. Mr. Golini testified that he frequently worked in close proximity to tradesmen who were installing, repairing and removing asbestos-containing products, and that he sometimes personally had to cut around insulation to get at gaskets and valves, creating dust.[156] Mr. Golini also disclosed the Navy ships on which he worked, including

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[153] *See* ACC-319 (TEF/Ornstein) at GST-EST-0556252; GST-3741 (Ornstein's Interrogatory Responses) at GST-EST-0512294 & Ex. A.

[154] ACC-331 (MEA/Ornstein).

[155] Simon Greenstone 30(b)(6) Dep. (Simon) 299:17-19, Mar. 26, 2013. Under California law in 2008, Garlock was at risk of being held liable for the insulation products surrounding its products; thus, as a strategic matter, Garlock "was not interested in building out those exposures." *Id.* at 300:5-301:5; 303:15-19. As Mr. Simon explained, Garlock's tactical dilemma was not unusual: "This is pre-*Taylor*. This is 2008. Those thermal insulation exposures were something which the valve companies, the pump companies, could be liable for. So they were not interested clearly enough in building out those exposures, and therefore they didn't." *Id.* at 300:23-301:2.

[156] *See* Committee Br., Appendix II at 65; GST-2842 (Golini Dep. Aug. 10, 2000) at 31:12-32:14.

the USS Intrepid. Garlock already possessed machinery records for the USS Intrepid, produced to it in a previous case; according to a report generated by Garlock's expert, Garlock had also been provided a second report detailing the insulation products on that ship.[157] It bears noting that Garlock did not provide the Committee with a copy of that report, despite having stipulated that it would provide all documents concerning exposures of the Designated Cases.[158] Mr. Golini's counsel, Mr. Shein, admitted that if exposures known to the client were not disclosed in discovery, it was a mistake on the part of his law firm.[159] Under Pennsylvania law applicable to the *Golini* case, however, the identities of bankrupt manufacturers were irrelevant. Only named defendants could be apportioned a share of the verdict; bankrupt entities and their successor trusts could not be joined, and thus could not be allocated responsibility.[160]

In sum, Garlock engages in systematic distortion and hyperbole in recasting its five Designated Cases.[161] More important for estimation, Garlock cannot reasonably escape the implications of its long settlement history by singling out a small number of cases for the inherently misleading exercise of retrying them on paper. It asks the Court to conclude that a tiny percentage of its claims in 2004-2005 account for a run-up in defense costs, but this is more

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[157] ACC-6020 (USS Intrepid Historical Report) at 3.

[158] *See* Committee Br., Appendix II at 66-67 & n.493 (citing Stipulation and Order).

[159] Shein Law Center 30(b)(6) Dep. (Shein) 65:22-66:2, Jan. 16, 2013.

[160] *See* Committee Br., Appendix II at 65-66.

[161] A telling indication of Garlock's overreaching in attacks on the plaintiffs' bar is its pointing to the *Kananian* case as a template of widespread abuse. Hr'g Tr. 1176:10-1179:24, July 26, 2013 (Brickman). The Brayton, Purcell firm were counsel in that case. At the Estimation Hearing, David Glaspy went out of his way to extol that firm as one that routinely makes complete disclosures of clients' asbestos exposures. Hr'g Tr. 4539:16-4540:1, Aug. 12, 2013 (Glaspy).

plausibly explained in other terms: Garlock had lost the opportunity to "free-ride"[162] on the defense efforts and settlement payments of defendants like Owens Corning and Pittsburgh Corning, which had formerly been spotlighted on the stage of asbestos litigation but had exited the litigation through bankruptcy. Garlock therefore needed to mount a serious defense against the increasingly focused and effective efforts of plaintiffs' counsel in gasket cases.[163] By its own admission, after 2005 Garlock adapted to the situation and managed the litigation effectively.[164] It has failed to undermine in any significant way the integrity and economic realism of its settlements in the period 2006-2010 that Dr. Peterson uses to calibrate his estimate.

IV. ALL PRECEDENT REJECTS GARLOCK'S AND COLTEC'S ATTEMPT TO FASHION NEW NATIONWIDE TORT LAW IN THIS BANKRUPTCY FORUM

Garlock's liability for mesothelioma claims is ultimately determined by state laws in all their diversity, governing such matters as the standard for causation, the allocation of liability among joint tortfeasors, the burden of proof, how verdicts may be set off by settlements, discovery principles, and more. In each state, and among many courts, these rules may differ. Garlock may have an advantage in one jurisdiction, while suffering a disadvantage in another. In this estimation, the Court must take this wide variety of state law into account. "The 'basic federal rule' in bankruptcy is that state law governs the substance of claims . . . Congress having 'generally left the determination of property rights in the assets of a bankrupt's estate to state law.'" *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000) (quoting *Butner v. United States*, 440 U.S. 48, 54 (1979)). Fortunately, the standard methodology adopted by Dr. Peterson

[162] Hr'g Tr. 3431:25-3434:9, Aug. 6, 2013 (Hanly); Hr'g Tr. 3794:2-3795:22, 3813:4-10, Aug. 8, 2013 (Hanly).

[163] Committee Br. at 10-11.

[164] Garlock Br. at 24 & n.66.

accommodates the variety of state law because it relies on Garlock's own settlement history, and therefore incorporates the parties' own assessments of the strengths and weaknesses of each case in the many jurisdictions in which Garlock faced liability.

Garlock and Coltec, however, have a different idea. They have, though their science witnesses, through Dr. Bates, and in argument, explained that they would like this estimation to take place in a world with different rules, a world in which Garlock's products cannot cause disease, joint and several liability is eliminated, and novel rules of set off and "credit" snuff out liability. It is not hard to understand why they prefer an imaginary regime that preserves Coltec's equity in Garlock. They are not the first to argue that bankruptcy represents a free pass from the liability that existing law imposes. It is, however, an argument that should be dismissed as turning the proper relationship of bankruptcy and non-bankruptcy law on its head.

A. Science Issues that Arise Case-by-Case Are Not Before this Court in a Global Estimation and Their Case-by-Case Resolutions Are Embedded in Garlock's Settlement Data

In advance of the Estimation Hearing, the Court informed the parties that it would not decide disputed scientific issues in the context of the estimation proceeding.[165] In their opening statement, accordingly, Garlock's attorneys assured this Court they would not ask the Court to render any rulings on the scientific evidence that they wished to present at the Estimation Hearing. Specifically, Mr. Harris stated, "We're not asking the court to decide the merits of any individual claim, or decide any scientific issues here."[166] Later on in his statement, Mr. Harris reiterated that "we're not asking the court to determine whether chrysotile is a cause of

[165] Hr'g Tr. 170:8-22, Jan. 26, 2012; Order for Estimation of Mesothelioma Cases ¶ 11, dated Apr. 13, 2012 [Dkt. No. 2102].

[166] Hr'g Tr. 18:25-19:1, July 22, 2013 (Opening Statement).

mesothelioma."[167] But Garlock's proposed Findings of Fact and Conclusions of Law repudiate these assurances and ask the Court to adjudicate Garlock's disputed factual defenses to mesothelioma claims, as though this were a tort suit rather than a proceeding for aggregate estimation.

For example, Garlock asks the Court to find, as a matter of law, that "low-dose chrysotile products like Garlock's gaskets and packing are not a cause of mesothelioma."[168] The Committee's medical experts, however, persuasively rebutted the opinions of Garlock's medical experts who asserted that exposure to chrysotile asbestos dust and fibers from the use of Garlock gaskets and packing was incapable of causing mesothelioma. Well supported by a voluminous body of scientific literature, the Committee's medical experts testified that (i) chrysotile asbestos causes mesothelioma;[169] (ii) there is no safe level of exposure to any type of asbestos, including chrysotile;[170] (iii) exposures to asbestos as brief as a few days can cause mesothelioma;[171] (iv) mesothelioma is caused by the cumulative amount of asbestos exposure, so the more a person is exposed the greater the risk;[172] and (v) asbestos exposures from fabricating and removing asbestos gaskets can result in concentrations of asbestos that are well in excess of what is found in background ambient air.[173]

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[167] Hr'g Tr. 27:21-22, July 22, 2013 (Opening Statement).

[168] Garlock Findings at 4. Garlock made similar statements in its brief. Garlock Br. at 1.

[169] Hr'g Tr. 1989:14-1990:1, July 30, 2013 (Brodkin); Hr'g Tr. 2111:8-12, 2128:2-18, July 31, 2013 (Welch).

[170] Hr'g Tr. 1948:25-1949:21, July 30, 2013 (Brodkin); Hr'g 2128:19-2129:6, July 31, 2013 (Welch).

[171] Hr'g Tr. 2122:2-2123:25, July 31, 2013 (Welch).

[172] Hr'g Tr. 1948:6-24, July 30, 2013 (Brodkin); Hr'g Tr. 2004:9-19, July 31, 2013 (Brodkin); Hr'g Tr. 2148:4-2152:11, July 31, 2013 (Welch).

[173] Hr'g Tr. 1748:4-1753:13, July 30, 2013 (Templin).

Garlock's proposed finding directly contradicts Garlock's own Material Safety Data Sheets which state that a health hazard would arise "if the products were subjected to mechanical actions that would cause the asbestos fibers to be released" and that doing so could lead to the inhalation of airborne asbestos fibers that "can cause the well-known long term effects of asbestosis, lung cancer, and mesothelioma."[174] As Garlock's industrial hygienist Larry Liukonen admitted, the use of a mechanized wire brush to remove a used gasket residue from a flange was an ordinary condition of use involving a Garlock gasket.[175]

Garlock's Post-Trial Brief and its proposed Findings of Fact misleadingly cite Dr. Brody's testimony for the proposition that "the 'consensus of the medical community' is that 'chrysotile-induced mesothelioma only occurs with very high exposures' such as occur in 'mining situations.'"[176] The distortion of Dr. Brody's testimony is evident by the multitude of quotation marks present—this is not a full and fair rendition of his testimony. He never testified that chrysotile *only* causes mesothelioma at high doses and, in fact, he made clear that there are numerous reports of mesothelioma cases from low-dose exposures.[177] Dr. Brody's testimony in that regard is supported by both Dr. Brodkin and Dr. Welch.[178]

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[174] ACC-3, Hr'g Tr. 593:23-594:25, July 24, 2013 (Liukonen).

[175] *Id.* at 594:21-25.

[176] Garlock Br. at 11; Garlock Findings at 3, ¶ 15.

[177] Hr'g Tr. 1901:3-1902:7, July 30, 2013 (Brody).

[178] Hr'g Tr. 1989:14-1990:1, July 30, 2013 (Brodkin); Hr'g Tr. 2122:1-2126:17, July 31, 2013 (Welch). Garlock goes so far as to include graphics in its brief that were contradicted by the cross-examination of its witnesses. For example, Garlock includes a slide from Dr. Anderson's testimony regarding her interpretation of the Regulatory Dose Response Model, which implies that the linear dose-response curve used by government agencies overestimates the incidence of disease at low levels. Garlock, however, fails to address the finding from Berman & Crump's research that demonstrates that for exposures to chrysotile asbestos the dose-response curve is actually *supra* linear. Hr'g Tr. 1099:3-1100:16, July 25, 2013 (Weill). The government's use of
(Footnote continued on next page.)

Another example of a disputed scientific issue on which Garlock inappropriately seeks a finding as a matter of law is the relative potency of different kinds of asbestos fibers:

> If chrysotile fibers can cause mesothelioma at all, their potency is at least two orders of magnitude less than for amphiboles. As explained by a Committee expert, who has testified to a 500-times potency difference, "what that means is you may need 500 chrysotiles for every amphibole."[179]

In support of this statement, Garlock again cites Dr. Weill's testimony but also cites to the testimony of Dr. Brody, taken misleadingly out of context. During his examination, Dr. Brody testified that the researchers who published the 500-times potency number had re-evaluated their study and reduced their potency calculation by a factor of ten, *i.e.*, a ratio of 50 for crocidolite, 10 for amosite and 1 for chrysotile.[180] Garlock ignores the testimony of the Committee's two other medical experts, Dr. Welch and Dr. Brody. Dr. Welch agreed that historical evidence was insufficient to do a quantitative differential differentiation of asbestos fibers by fiber type.[181] In her view, the recent medical literature, at best, suggests a ratio of 25 for crocidolite, 5 for amosite and 1 for chrysotile.[182] Dr. Brodkin, on the other hand, testified that any potency difference between the fiber types is not clinically important and that, in his opinion, amphibole asbestos fibers are only three times more potent than chrysotile asbestos fibers.[183]

(Footnote continued from previous page.)
a linear dose-response model for exposures to chrysotile asbestos actually *underestimates* exposures at lower levels.

[179] Garlock Findings ¶ 17.

[180] Hr'g Tr. 1913:9-1914:4, July 30, 2013 (Brody). Garlock, of course, made crocidolite gaskets as well as chrysotile ones. ACC-69.

[181] Hr'g Tr. 2144:20-2145:3, July 31, 2013 (Welch).

[182] *Id.* at 2146:6-2147:15.

[183] Hr'g Tr. 1987:25-1989:1, July 30, 2013 (Brodkin).

Garlock's mischaracterizations are not limited to factual issues. Garlock's citation of cases is equally misleading. Garlock cites the recent decision in *Wannall v. Honeywell International, Inc.*, 2013 U.S. Dist. LEXIS 68523 (D.D.C. May 14, 2013), without disclosing that the decision was based upon a causation standard specific to Virginia law. Responding to a ruling from the Virginia Supreme Court that significantly altered Virginia's causation law by rejecting "substantial contributing factor" in favor of a "sufficient to have caused the harm," (*id.* at *39), standard, the court in *Wannall* granted summary judgment to the defendant because the plaintiff failed to present any evidence of what level of exposure to asbestos is sufficient to cause mesothelioma.[184]

In a similar vein, Garlock cites to the recent decision of the Pennsylvania Supreme Court in *Howard v. A.W. Chesterton Co.*, 2013 Pa. Lexis 2199 (Pa. Sept. 26, 2013), without fully disclosing that the appeal was "resolved upon mutual consent among the parties" (*id.* at *1), who agreed that a plaintiff cannot get to the jury on causation under Pennsylvania law based solely on an expert's affidavit that every single fiber of asbestos is causative in the development of a mesothelioma. The Pennsylvania Supreme Court did not, as Garlock implies, adopt the statement in a party's brief that "[t]he test for adequacy is the comparison of the particular

[184] Garlock has elsewhere asserted incorrectly that substantial contributing factor is a uniform standard that applies in all states. Hr'g Tr. 19:12-16 (Garlock's Opening Statement). *Wannall* is one example demonstrating that Garlock's generalization is simplistic and misleading. Another recent example is *Pfeifer v. John Crane, Inc.*, 2013 WL 5815509 (Cal. Ct. App. Oct 29, 2013), decided on October 29, 2013, which reaffirmed California's *Rutherford* rule that the causation issue is not whether asbestos fibers from the defendant's products in fact caused the plaintiff's mesothelioma, but rather whether exposure to the product was not *de minimis* and increased the plaintiff's *risk* of contracting the disease. *Rutherford* is cited and discussed at pages 57-58, below. And the diversity of causation standards under the laws of the several states is addressed in Appendix A to this brief (cited below as "**App. A**.").

product exposure(s) to the totality of the person's asbestos exposures."[185] Rather, it simply reiterated its long standing rule that an expert witness opining on substantial factor causation must base his or her opinion on "some reasoned, individualized assessment of a plaintiff's or decedent's exposure history," (*id*. at *5)—a proposition supported by the Committee's medical experts.

In sum, the medical and scientific propositions that Garlock endeavored to prove at the Estimation Hearing were fiercely contested and can only be decided properly in actual tort suits tried to juries. Because no individual cases are at issue here, the Court should not accept any proposed findings that are dependent on facts specific to an individual case. [186] In proceeding to estimate the aggregate value of pending and future mesothelioma claims, Garlock should be held to its word and the Court need not decide any scientific issues, especially since Garlock's estimation expert, Dr. Charles Bates, does not rely on any of the medical or scientific issues in reaching his estimations.[187]

B. Claimants, Garlock and This Court Must Take Varying State Tort Law As They Find It; Garlock Is Not Entitled to Cherry-Pick but Must Take the Good With the Bad

Garlock makes much of a handful of cases that it finds congenial on issues of causation, attempting to elevate them to some kind of nationwide rule of law, while ignoring the many recent cases that disfavor it. But Garlock cannot pick and choose— it must take the tort law as it finds it. To illustrate the diversity of applicable law and show that Garlock's preferred cases by

[185] Garlock Br. at 10.

[186] *See, e.g.*, Garlock Findings ¶¶ 5, 8, 10, 11, 12, and 18.

[187] Hr'g Tr. 2903:11-25, Aug. 5, 2013 (Bates).

no means represent a national consensus, we have submitted with this brief an appendix summarizing state law decisions on causation in asbestos cases.[188]

Garlock also oversells the cases it features. It cites *Betz* and *Moeller* for the proposition that, if Garlock remained in the tort system, "the vast majority of current and future mesothelioma claimants simply would not be able to get their cases to a jury or sustain a verdict," because, as a matter of law, any exposure to fibers from Garlock's gaskets are too minimal relative to other exposures to be a substantial factor in causing mesothelioma.[189] But Garlock overreads and distorts both cases.

Betz addressed only the very narrow question of whether an expert opinion "to the effect that each and every fiber of inhaled asbestos is a substantial contributing factor to any asbestos-related disease" was sufficient to show specific causation.[190] The court emphasized that, while there might have been "other evidence upon which Appellee might have relied to avoid the summary judgment ruling," the plaintiffs had argued that they need only prove exposure to a single fiber, and thus *Betz* was a "test case" "for the any-exposure opinion as a means, in and of itself, to establish substantial-factor causation."[191] The court held that such an opinion was not enough to establish substantial factor causation without proof of exposure history.[192] In *Wolfinger v. 20th Century Glove Corp.*, No. 1393 EDA 2011, slip op. (Pa. Super Ct., Feb. 14,

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[188] *See* App. A.

[189] *See* Garlock Br. at 1, 9-10, 69-70 (citing *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011); *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 56-57 (Pa. 2012)).

[190] *Betz*, 44 A.3d at 30.

[191] *Id.* at 55 & n.34.

[192] As noted above, the court recently reaffirmed that ruling in *Howard v. A.W. Chesterton*, 2013 Pa. LEXIS 2199 (Pa. Sept. 26, 2013), but did not, as Garlock implies, adopt the statement from a party's brief that the "test for adequacy is the comparison of the particular product exposure(s) to the totality of the person's asbestos exposures." Garlock Br. at 10.

2013), the Pennsylvania Superior Court found that *Betz* did not preclude the admission of expert testimony that each and every exposure to asbestos contributed to causation where the evidence demonstrated that the decedent had been exposed to asbestos for over twelve years while handling asbestos-containing welding rods manufactured by the defendant.

The *Moeller* decision's "bucket in the ocean" rhetoric is certainly congenial to Garlock's position and seems to accept the premise that insulation exposures rendered gasket exposures *de minimis* by comparison. But the Sixth Circuit did not purport to announce a new rule of law in that case (much less, a nationwide rule), nor, as a federal court, could it properly have undertaken to change the governing Kentucky state law. Rather, *Moeller* is best understood as confirming that the element of substantiality in the "substantial causation factor" test is not to be overlooked in evaluating expert opinions and assessing the adequacy of exposure evidence. The case came to the Sixth Circuit on an unusual record, in that the plaintiff's expert, Dr. Arthur Frank, had "never testified that [plaintiff's] exposure to Garlock gaskets was a substantial factor in causing [plaintiff's] cancer." 660 F.3d at 954. Even so, it is doubtful that *Moeller* represents a correct application of the Kentucky law of causation in an asbestos tort suit, given that it conflicts with *CertainTeed v. Dexter*,[193] a decision of the Kentucky Supreme Court.

In *Dexter*, the Kentucky Supreme Court overruled an intermediate appellate ruling and reinstated a decision whereby the trial court had set aside a verdict in favor of the plaintiff because of the jury's failure to allocate to certain third-parties a portion of the legal responsibility for the asbestos-related harms suffered by the plaintiff. The Kentucky Supreme Court held that

[193] 330 S.W.3d 64 (Ky. 2010). Garlock itself was a defendant in *Dexter*, but was subject to the automatic stay, and the appeal to the Kentucky Supreme Court was prosecuted by its co-defendant, CertainTeed. Garlock subsequently had the stay lifted to prosecute an appeal on other grounds; that appeal was rejected by the Kentucky Court of Appeals. *See Garlock Sealing Techs. LLC v. Dexter*, 2012 WL 967617 (Ky. Ct. App. Mar. 23, 2012).

every proven exposure to the third-parties' asbestos-containing products "must have legally caused some portion of Dexter's injuries."[194] That determination rested squarely on testimony by the plaintiff's expert, Dr. Frank, to the effect that each and every exposure to asbestos that Mr. Dexter had added to his fiber burden and thus was a substantial contributing factor in the development of his disease.[195] In *Moeller*, the Sixth Circuit rejected the same opinion by the same expert as failing to satisfy the causation test applicable under Kentucky law, but in doing so failed to cite *Dexter*, the controlling pronouncement of that state's highest court. *Moeller* therefore should be confined to its facts, and it certainly does not square with the law existing in most states with significant amounts of asbestos litigation.[196]

In an evidentiary motion before the estimation proceeding, Garlock trumpeted a ruling by Maryland's intermediate appellate court in the *Dixon* case as one of a "cascade of cases" ostensibly supporting Garlock's view of causation law.[197] A few days before the estimation hearing, however, the highest court of Maryland overruled the decision and held that, where there is evidence of anything more than *de minimis* exposure, expert testimony that each and

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[194] *Dexter*, 330 S.W.3d at 79.

[195] *Id.* at 78-79.

[196] *See* App. A. It should be noted, however, that if *Moeller* were accepted as engrafting a more exacting causation standard onto Kentucky law, it would spell trouble for gasket makers in any efforts to apportion liability to other entities. At the very least, *Dexter* makes clear that the standard a defendant must meet in order to shift a portion of an adverse verdict to third persons is the same standard the plaintiff must satisfy to impose liability on the defendant in the first place. As David Glaspy put it when discussing the challenge Garlock faced in trying to prove causation against others in mesothelioma cases, "Live by the sword, die by the sword." Hr'g. Tr. 43:8-13, March 3, 2011 (Glaspy).

[197] *See* Debtors' Brief in Support of Their Motion to Exclude or Strike Committee Medical Expert Opinions at 24-25, dated July 3, 2013 [Dkt. No. 2982-original filed under seal] (citing *Dixon v. Ford Motor Co.*, 47 A.3d 1038 (Md. Ct. Spec. App. 2012), *cert. granted*, 55 A.3d 906 (Md. 2012)).

every exposure to asbestos was a substantial contributing factor in the causation of the plaintiff's disease is admissible. *Dixon v. Ford Motor Co.*, 70 A.3d 328, 337 (Md. 2013). The high court specifically noted that its ruling was not inconsistent with *Betz*, because, while *Betz* was a test case holding only that a single fiber was not substantial causation, in *Dixon* there was evidence of more than *de minimis* exposure. *Id.* at 336-37.

Contrary to Garlock's hopes, most courts throughout the country have adopted legal principles that make it difficult for defendants to obtain summary judgment where there is significant evidence of exposure to their products. Notably, the Multi-District Litigation ("**MDL**") court in Philadelphia, which conducts pretrial proceedings in all asbestos cases filed in the federal courts, has routinely denied defendants summary judgment in gasket cases involving the same kind of evidence that Garlock claims would be insufficient to withstand summary judgment in the vast majority of cases against it.[198]

[198] *See, e.g., Walker v. Owens-Illinois Glass Corp.*, MDL No. 875, Civ. A. No. 2:07-62843, 2011 WL 4790626, at *1 & n.1 (E.D. Pa. Jan. 28, 2011) (MDL, applying Maryland law and denying defendants' summary judgment motion on the basis of insufficient evidence of exposure where the plaintiff produced evidence through a co-worker that he had worked with exhaust gaskets when repairing aircraft engines); *Hoffeditz v. AM General, LLC*, MDL 875, Civ. A. No. 2:09-70103, 2011 WL 5881003 (E.D. Pa. July 29, 2011) (MDL, applying Pennsylvania law, the MDL court denied summary judgment where the plaintiff testified that he worked with defendant's engines, and that dust was released when he removed gaskets from the engines); *Constantinides v. Leslie Controls, Inc.*, MDL. No. 875, Civ. A. No. 09-70613, 2010 WL 3985579 (E.D. Pa. Oct. 8, 2010) (MDL, applying Florida law and rejecting summary judgment; plaintiff had worked for fifteen months in a boiler room where valves manufactured by the defendant were present, and had "occasionally" removed and replaced asbestos gaskets and packing on those valves); *Happel v. Anchor Packing Co.*, MDL No. 875, Civ. A. No. 09-70113, 2010 WL 7699153, at *1 & n.1 (E.D. Pa. Oct. 14, 2010) (MDL, applying Delaware law and denying summary judgment where there was testimony that a pump manufactured by defendant was in the engine room where the decedent worked, and defendant admitted that its pumps contained asbestos-containing sealing and gaskets).

In California, as David McClain testified, the test is whether exposure to the defendant's products increased the plaintiff's risk of contracting mesothelioma.[199] This has been the rule since *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1219 (Cal. 1997), in which the California Supreme Court held that a plaintiff can prove substantial factor causation by showing to a "reasonable medical probability" that exposure to defendant's asbestos-containing products "was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer." *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1219 (Cal. 1997). The plaintiff need not "demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that *actually* produced the malignant growth," or the "precise contribution that exposure to fibers from defendant's products made to plaintiff's ultimate contraction of asbestos-related disease." *Id*. at 1207, 1219. Rather, it suffices to present evidence of exposures along with expert testimony that the "particular asbestos disease is cumulative in nature, with many separate exposures each having constituted a 'substantial factor' that contributed to his risk of injury." *Id*. at 1207.[200]

Illinois law is even less favorable to the defendant. Not only do Illinois courts not require a showing of the quantity of fibers to which plaintiff was exposed, but even a slight exposure can be sufficient to show substantial-factor causation if there is "competent evidence that one or a *de*

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[199] *See* Hr'g Tr. 3462:21-3463:3, Aug. 7, 2013 (McClain).

[200] David Glaspy disputed Mr. McClain's understanding of the *Rutherford* standard. *See* Hr'g Tr. 4558:21–4559:1, Aug. 12, 2013 (Glaspy). But Mr. Glaspy was wrong, as confirmed by the recent decision in *Pfeifer v. John Crane Inc*., 2013 WL 5815509, at *6 (Cal. Ct. App. 2013) (citing *Rutherford*, 941 P.2d at 1214, 1220 ("In the context of injury claims based on exposure to asbestos from multiple sources, plaintiffs may establish that asbestos from a specific defendant's product was a 'cause in fact' of their cancer by showing that the asbestos 'was a substantial factor contributing to the . . . *risk* of developing cancer.'") (emphasis by the *Rutherford* court)).

minimis number of asbestos fibers can cause injury." *Johnson v. Owens-Corning Fiberglas Corp.*, 729 N.E.2d 883, 889 (Ill. App. Ct. 2000); *Tragarz v. Keene Corp.*, 980 F.2d 411, 421 (7th Cir. 1992) (applying Illinois law).

In short, Garlock attempts to cherry-pick the law it wishes to apply in its idealized world. In reality, though, Garlock would face claims arising under diverse state law, good and bad for its position. That was its dilemma for more than thirty years, and there is no evidence this would change if it were continuing to defend itself in the tort system.

C. Dr. Bates' Defendant-Friendly World Is Not Real and Cannot Properly Ground the Estimation

As Dr. Bates acknowledged in his testimony, his principal estimation method incorporates assumptions that diverge drastically from the actual tort system.[201] One of the key assumptions is that, if Garlock suffered a mesothelioma verdict, Garlock's liability would be shared equally among 36 responsible parties. This assumption ignores and overrides state law in several ways.

First, the assumption inappropriately increases the number of responsible parties beyond what Garlock could realistically prove in the tort system. It does so by eliminating the real burdens Garlock faces in the tort system when it attempts to impose a "share" of a verdict on other entities. For example, Dr. Bates assumes that any exposure to an asbestos product other than Garlock's, no matter how trivial, is a cause of mesothelioma and would share in the verdict. Garlock advertises this as a "claimant friendly" assumption;[202] in reality it is a theory that

[201] Hr'g Tr. 2968:11-2969:16, Aug. 5, 2013 (Bates).

[202] Garlock Br. at 69.

Garlock attributes to plaintiffs at large, but one that grossly overstates their real position.[203] Although inconsistent with Garlock's other arguments (Garlock simultaneously insists that mere exposure to asbestos from its own products does ***not*** cause mesothelioma[204]), Dr. Bates uses this assumption to relieve Garlock of the burden it would have to meet to prove another entity was responsible.[205] Dr. Bates also assumes that trust claims, bankruptcy ballots and Rule 2019 statements each constitute proof of exposure sufficient for a jury to assign a share of a verdict to a bankrupt entity, but the evidence shows that such materials do not support such a finding.[206]

Dr. Bates next eliminates joint and several liability entirely with the assumption that all 36 shares would be "equal." Joint and several liability is a significant feature of the law in many of the states in which Garlock faces liability. It represents a deliberate policy choice by those states to place the risk of a defendant's insolvency on other defendants adjudged responsible, rather than on an innocent plaintiff.[207] In some states, pure joint and several liability is the rule —Maryland is one such state.[208] In other states, joint and several liability has been modified and is imposed only in certain circumstances or for certain types of damages. For example, joint and

[203] Committee Br. at 60.

[204] Garlock Findings at 4.

[205] In general, a defendant who seeks to impose liability on a non-party must meet the same burden of proving fault that the plaintiff does. Hr'g Tr. 4654:9-4656:9, Aug. 22, 2013 (Glaspy); Hr'g Tr. 2379:14-2380:6, Aug. 1, 2013 (Turlik). *See* Committee Br. at 38 & n.161.

[206] Hr'g Tr. 3682:15-3683:10, Aug. 7, 2013 (Patton). *See In re Asbestos Litig.*, No. 2004-03964, slip op. at 5-6 (Tex. Dist. Ct. Jan. 16, 2009) (letter order from MDL Judge Davidson) (noting with respect to trust claim forms that "[a] bare application that alleges exposure is not sufficient to be any evidence of causation under *Borg Warner* standards" and therefore cannot make out a *prima facie* case for a defendant seeking to apportion liability to a trust).

[207] Restatement (Third) of Torts: Apportionment of Liability § 10 cmt. a (2000) ("The rationale for employing joint and several liability and thereby imposing the risk of insolvency on defendants [is] that[,] as between innocent plaintiffs and culpable defendants[,] the latter should bear this risk . . . .").

[208] *Consumer Prot. Div. v. Morgan*, 874 A.2d 919 (Md. 2005).

several liability is imposed in California, except for non-economic damages.[209] In New York, joint and several liability applies to economic damages and to non-economic damages where a defendant is more than 50% at fault; however, joint and several liability for all damages can be imposed where there is a finding of recklessness.[210] The imposition of joint and several liability in such "hybrid" jurisdictions is a frequent result in asbestos cases that go to verdict.[211] Garlock, too, has been subjected to verdicts of joint and several liability in these jurisdictions.[212]

Because it effectively increases the liability share of the litigant subject to a verdict, the impact of joint and several liability on the amount of Garlock's liability can be significant. Corporate defendants have long disfavored joint and several liability, characterizing it as unfair or as a search for "deep pockets." In some states, corporate defendants have successfully lobbied legislatures to shift to a several liability scheme, at least in part. The current state of the law reflects the political compromises made in state capitols over many decades. But it is precisely this hard-fought reality that Dr. Bates eliminates when he assumes away joint and several liability and puts in its place nationwide several liability. Neither Dr. Bates nor Garlock offers any cogent explanation for this step. Garlock merely says that a different result is "unthinkable."[213] It then retreats to its convenient but unsubstantiated argument that verdicts it

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[209] Cal. Civ. Code §§ 1431, 1431.2.

[210] N.Y. C.P.L.R. § 1601. The significant impact of a recklessness finding in New York goes unmentioned in the Robinson Bradshaw summary of liability apportionment law provided to Dr. Bates. GST-1305 (Memorandum re: Law of Apportioning Damages in Asbestos Cases in Fifty States and District of Columbia, and Under Admiralty Law; from Robinson, Bradshaw & Hinson, P.A.). This omission points up the distorting effect of Garlock's assumption that its exposure in "hybrid" jurisdictions is to several liability only.

[211] ACC-750a-d (verdicts in *Assenzio* and related cases).

[212] *E.g.*, ACC-404.

[213] Garlock Br. at 95.

suffered without being able to share liability equally with 35 other entities were the result of plaintiffs' fraud.[214]

V. THE COURT SHOULD ADOPT DR. PETERSON'S REASONABLE AND REALISTIC ESTIMATE

Dr. Bates' estimate should be rejected as an artifice designed to produce an unrealistically low estimate. Attention should turn, then, to comparison of the estimates provided by Dr. Peterson and Dr. Rabinovitz with a view to discerning which provides better guidance for a reasonable approximation of mesothelioma claims, present and future, in the aggregate. Although both of these estimates rest on Garlock's actual claims data from the mid- and late-2000s, epidemiological forecasts of the future incidence of mesothelioma, and historically-derived assumptions about future mesothelioma victims' propensity to sue Garlock, it is not difficult to isolate important differences in their application of the basic methodology and measure the impact of those differences.

We refer to the estimates below by the initials of the experts' respective firms: "HRA" for Dr. Rabinovitz and "LAS" for Dr. Peterson. Although Dr. Rabinovitz valued defense costs as part of her estimate,[215] we exclude such costs here to separate out her aggregate valuation of the claims themselves, thereby placing her estimate and Dr. Peterson's on an apples-to-apples basis. The HRA Estimate is $949 million and the LAS Estimate is $1.265 billion. The total difference between them is $316 million, which may be broken down as follows:

[214] Garlock Br. at 97-98.

[215] Historically, Garlock's defense costs amounted to about 22% of its total asbestos expenditures (the sum of indemnity paid to claimants plus costs of defense). *See* ACC-159.

Quantifying Differences Between HRA & LAS Estimates
(In Millions of Dollars)

Sources of Difference	*Liability Estimate*	*Dollar Increment*	*Percentage Increment*	*Cumulative Percentage*
HRA Estimate	**$949**	--	--	--
1 Adjust calibration values to 2010 dollars	$990	$41	13.0%	13.0%
2 Use Nicholson epidemiology	$1,050	$60	19.0%	32.0%
3 Recognize trend in propensity to sue	$1,179	$129	40.8%	72.8%
4 Use 2006-2010 calibration period	$1,220	$41	13.0%	85.8%
5 Adopt LAS's average settlement and discounting	$1,246	$26	8.2%	94.0%
6 Data processing differences (net)	$1,265	$19	6.0%	100.0%
LAS Estimate	**$1,265**	--	--	--

As is evident from the foregoing analysis, most of the dollar difference between the two estimates comes from just three steps in the reconciliation: Step 1—In calculating settlement averages for her forecast, Dr. Rabinovitz failed to adjust for monetary inflation that occurred during her chosen calibration period (2005-2010); as a result, she treated all settlements from that period as though they had been paid in 2010 dollars, even though the dollars paid in previous years were worth more than 2010 dollars due to inflation. Step 2—Dr. Rabinovitz used KPMG's adjustments to Dr. Nicholson's epidemiological forecast, even though empirical tracking of U.S. mesothelioma incidence does not confirm the accuracy of those adjustments, but rather confirms the original unadjusted Nicholson forecast. Step 3—Dr. Rabinovitz did not account for the trend in the "propensity to sue" that is evident when Garlock's claims data is examined in light of the incidence of mesothelioma. Taken together, these three items account for $230 million, or 72.8%, of the difference between the HRA Estimate and the LAS Estimate.

The failure to adjust for inflation in using payment data from the calibration period is simply a technical mistake in Dr. Rabinovitz's calculations. Because of inflation, a dollar in June 2010 had less purchasing power than a dollar in June 2006. To mix dollars from 2006,

2010, and the three intervening years is equivalent to adding up the numbers of one U.S. dollar, four British pounds, two Euros, five Mexican pesos, and three Swiss francs without recognizing that these currencies have different values. The resulting sum cannot be meaningful. But, of course, a meaningful calculation can be made by converting all units in the calculation to a single currency by applying exchange rates before adding them up. Similarly, when adding dollars across different years in a valuation analysis like claims estimation, an analyst must adjust for inflation so as to capture the relative values of those dollars on a consistent basis. The HRA Estimate omitted that step, and the effect is an understatement of $41 million.

Comparing data collected by the U.S. government on the actual incidence of mesothelioma in this country to KPMG's adjustments to the Nicholson epidemiology shows that KPMG substantially underestimated the number of mesotheliomas and predicted a more accelerated decline than has actually occurred.[216] In other words, Dr. Nicholson's projection has proven more accurate under empirical testing than KPMG's. Resting as it does on KPMG's version of the epidemiological projection, the HRA Estimate is $60 million less than it would be if the Nicholson projection were used instead. This alone accounts for 19.0% of the difference between the HRA Estimate and the LAS Estimate.

In Section I.A. of this brief, we have pointed out that Garlock's historical claims data show clearly that the "propensity to sue" Garlock was rising throughout the latter half of the 2000s. In general, then, the persons claiming against Garlock for mesothelioma every year represented a higher percentage of the predicted number of diagnoses of that disease in the United States for the same year. This is a fact. It describes an important attribute of

[216] Hr'g Tr. 3894:3-15, Aug. 8, 2013 (Peterson) and ACC-824a at 39. *Compare* Hr'g Tr. 4176:22-4177:9, Aug. 9, 2013 (Rabinovitz) *and* FCR-42 at 22.

mesothelioma filings against Garlock at the time of its bankruptcy: the percentage of mesothelioma victims suing Garlock was going up.[217] There is no valid reason to ignore this reality. And no one has suggested any reason to expect that the pattern would not hold for at least several years after June 2010 if Garlock remained in the tort system.

Three factors interact to determine the number of claims Garlock would receive if it were not in bankruptcy: (1) the number of mesothelioma claims filed every year during the chosen calibration period, which may be referred to as the "level" of claiming; (2) the expected decline in the incidence of disease; and (3) the trend affecting the percentage of mesothelioma victims choosing to claim against Garlock, *i.e.*, the propensity to sue. The LAS Estimate gave effect to all three factors to forecast that mesothelioma filings after 2010 would (a) begin at the average level of the prior five years (*not* at the higher annualized level actually reached in 2010), and then (b) trend up modestly until 2014 before declining. The HRA Estimate, on the other hand, took no account of the actual trend. It assumed the level of claiming from the calibration period and the declining disease incidence from the epidemiology (exaggerating that decline somewhat through use of the KPMG version, as noted above), but disregarded the rising propensity to sue. Ignoring that trend depressed the forecasted number of claims in the HRA Estimate, introducing an abrupt break from experience and distorting expectations. As a result, the HRA Estimate is understated by $129 million. This is the most significant difference between the two estimates, accounting for just under 41% of the gap.

[217] ACC-824a at 33 (summary included in Peterson presentation). Dr. Peterson thus forecasted that the propensity to sue would increase from 2011 through 2014 (corresponding roughly to the length of the historical calibration period he used) and then hold steady. This pattern is depicted in the chart on page 25 of the Committee's initial brief, which itself replicates one of Dr. Peterson's demonstrative slides. *See* Committee Br. at 25; ACC-824a at 35.

In evaluating the trend issue, it is important to understand that the increasing propensity to sue assumed in the LAS Estimate does *not* translate to a greater number of annual claim filings than Garlock experienced historically. When applied to the projected incidence of mesothelioma, the propensity to sue assumptions in the LAS Estimate point to *fewer* annual claims for *each* year in the forecast than Garlock actually received in the period 2008-2010 (allowing for annualization of Garlock's experience through May 2010). This is evident from the chart reproduced on page 10 of this brief.[218]

The foregoing analysis of the differences that matter most between the HRA Estimate and the LAS Estimate shows that the latter is the more soundly based and should be preferred. In contrast, the difference in calibration periods (2005-2010 for HRA, 2006-2010 for LAS) has no impact on propensity to sue assumptions. The two experts arrived at differing calculations of the average settlement (payments divided by all claims resolved, including those rejected without payment): $42,528 for HRA and $44,459 for LAS. The difference is less than 6% and likely stems mostly from details of data interpretation, but this in no way undermines the reasonableness of LAS's calculation. Notably, the present value discount applied in the LAS Estimate (3.251%, a spread of 0.75% over inflation) is greater than the corresponding discount in the HRA Estimate (2.81%, or 0.51% over inflation), which effectively reduces the LAS Estimate by $30 million on a comparative basis.

In short, examining the LAS Estimate side-by-side with the HRA Estimate confirms that Dr. Peterson's analysis is reasonable and reliable. All things considered, the Court should prefer the LAS Estimate to avoid the risk of understating the estimate. As Garlock seeks a permanent

[218] *See* n.24, *supra*, and accompanying text.

discharge and Coltec injunctive relief, the risk of imprecision should be borne by them, rather than by involuntary tort creditors.[219]

CONCLUSION

For the foregoing reasons, and those set forth in the Committee's initial Post-Hearing Brief, the Court should adopt Dr. Peterson's analysis and estimate the pending and future mesothelioma claims against Garlock, in the aggregate, at not less than $1.265 billion.

[219] *See* Committee Br. at 20.

Respectfully submitted,

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